

# **LIMITATIONS ON RELIGIOUS FREEDOM IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS**

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## **I. THE NORMATIVE CONTEXT**

The European Convention on Human Rights (hereinafter ECHR or “the Convention”) is the first and principal achievement of the Council of Europe. It was signed in 1950<sup>1</sup> and has been successively amended by several protocols. Its interpretation and application corresponds, specifically and exclusively, to the European Court of Human Rights (hereinafter ECtHR or “the Court”), located in Strasbourg, France, which has jurisdiction over every State that has signed the Convention. The ECtHR began adjudicating cases in 1959. Protocol n. 11 to the Convention, which came into force in November 1998, substantially changed the Court’s structure and procedures.<sup>2</sup>

Three provisions of the ECHR deal with religion.<sup>3</sup>

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<sup>1</sup> The European Convention was signed in Rome on 4 November 1950 and entered into force on 3 September 1953.

<sup>2</sup> The ECtHR now functions on a permanent basis. It has as many judges as there are States who have signed the ECHR and consequently accepted the jurisdiction of the Court. The judges are elected by the Parliamentary Assembly of the Council of Europe from a list of three candidates presented by the State. They serve for a term of six years. *See* Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994, Europ. T.S. No. 155. The full text of the ECHR as amended by Protocol n. 11, and the rest of the basic texts of the Convention, can be obtained in the web site of the ECtHR: <http://www.echr.coe.int/> (last visited February 2005) (decisions of the Court now available at same).

<sup>3</sup> On the protection of religious freedom in the system of the Council of Europe, *see generally* CAROLYN EVANS, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN* (2001); MALCOLM D. EVANS, *RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE* (1997); LEONARD M. HAMMER, *THE*

Article 9 recognizes the freedom of thought, conscience and religion, and enumerates the limitations that may be imposed on the manifestations of this freedom:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.<sup>4</sup>

Article 14 enshrines the principle of equality and prohibits discrimination based on religion:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.<sup>5</sup>

Finally, Article 2 of the First Protocol (1952) endorses the rights of parents to choose the religious or ideological orientation of their children's education:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such

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INTERNATIONAL HUMAN RIGHT TO FREEDOM OF CONSCIENCE (2001); Javier Martínez-Torrón, *Religious Liberty in European Jurisprudence*, in RELIGIOUS LIBERTY AND HUMAN RIGHTS 99 (Mark Hill ed., 2002); Javier Martínez-Torrón & Rafael Navarro-Valls, *The Protection of Religious Freedom in the System of the Council of Europe*, in FACILITATING FREEDOM OF RELIGION OR BELIEF: A DESKBOOK 209 (Tore Lindholm, et al. eds., 2004). For the purposes of this paper, I have preferred to focus on the case law of the ECtHR and to reduce the bibliographical references to a minimum; further references can be found in the works previously cited.

<sup>4</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Jun. 4, 1950, art. 9, Europ. T.S. No. 5, available at <http://www.echr.coe.int/Convention/webConvenENG.pdf> [hereinafter ECHR].

<sup>5</sup> ECHR, *supra* note 4, art. 14.

education and teaching in conformity with their own religious and philosophical convictions.<sup>6</sup>

The limitations on freedom of religion or belief contained in Article 9(2) are applicable also to the right recognized by Article 2 of the Protocol, for this provision ultimately designates parents as surrogates of their children with regard to the exercise of religious freedom within the educational environment. Article 14, in turn, forbids States from applying permissible restrictions on freedom of religion in a discriminatory fashion.

On the other hand, the limitations applicable to the freedom of thought, conscience and religion, as described in Article 9, are largely coincident with the limitations applicable to the freedoms protected by other Articles of the Convention, namely Articles 8, 10 and 11.<sup>7</sup> Consequently, many of the general principles established by the Court with respect to the latter Articles are also valid for the interpretation of Article 9(2). In all cases, limitations on freedoms must be: 1) *prescribed by law*; 2) *necessary in a democratic society*; 3) *proportionate to reach some of the aims itemized in par. 2 of the*

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<sup>6</sup> Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 2, Europ. T.S. No. 9, available at <http://www.echr.coe.int/Convention/webConvenENG.pdf>.

<sup>7</sup> Article 8(2) [*Right to respect for private and family life*]:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ECHR, *supra* note 4, art. 8(2).

Article 10(2) [*Freedom of expression*]:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ECHR, *supra* note 4, art. 10(2).

Article 11(2) [*Freedom of assembly and association*]:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ECHR, *supra* note 4, art. 11(2).

corresponding Article, which are the only legitimate aims within the ECHR framework. With regard to freedom of religion or belief, the list of permissible aims is even narrower than with regard to other freedoms. Those aims are, in particular: the interests of public safety; the protection of public order, health or morals; and the protection of the rights and freedoms of others.

I shall refer later to the interpretation of those concepts in the case law of the Court. First, I would like to point out a distinction that is essential to understand the ECtHR doctrine on the limitations on religious freedom.

## II. THE INTERNAL AND EXTERNAL ASPECTS OF RELIGIOUS FREEDOM

The case law of Strasbourg emphasizes that it is necessary to distinguish between the internal and external aspects of religious liberty. The former is the freedom to *believe*, which embraces the freedom to choose one's beliefs—religious or non-religious—and the freedom to change one's religion. The latter consists in the freedom to *act* according to one's religion or belief. The internal dimension of religious freedom is *absolute*, while the external dimension is by its very nature *relative*. Indeed, Article 9(2) clearly states that the limitations specified therein may be applied only to the “[f]reedom to manifest one's religion or beliefs.”<sup>8</sup> Freedom to believe, on the contrary, may not be restricted,<sup>9</sup> probably not even in the exceptional circumstances that, according to Article 15, permit the States to derogate some of their obligations under the ECHR.<sup>10</sup>

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<sup>8</sup> ECHR, *supra* note 4, art. 9(2).

<sup>9</sup> See *C. v. The United Kingdom*, App. No. 10358/83, 37 Eur. Comm'n H.R. Dec. & Rep. 142, 147 (1983). In that case the European Commission of Human Rights—suppressed in 1998, when Protocol n. 11 to the ECHR came into force—utilizes the expression “forum internum.” *Id.* See also *V. v. The Netherlands*, App. No. 10678/83, 39 Eur. Comm'n H.R. Dec. & Rep. 267, 268 (1984); *Raoult v. France* (unpublished); *Darby v. Sweden*, App. No. 11581/85, Report of the Commission, § 44 (1989), at [www.echr.coe.int/eng](http://www.echr.coe.int/eng). The ECtHR, following the Commission's approach, has subsequently alluded to the double side of religious freedom, and has emphasized that the limitations stated in article 9(2) are applicable only to the freedom to *manifest* one's religion or belief, but not to the freedom to *choose* one's religion or belief. See e.g. *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. (Ser. A) 3, 17–18 (1993).

<sup>10</sup> Article 15(1):

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

ECHR, *supra* note 4, art. 15(1).

An immediate consequence of this doctrine is that public authorities can not take or permit a direct action to impel the citizens to believe or not to believe in something, nor can they try to influence the citizens' conscience in a matter such as religion or belief, which is considered the exclusive choice of individuals; it would be tantamount to invading an intangible space of the people's internal autonomy. For that reason, the ECtHR held in 1976, in the *Kjeldsen* case, that the State, when organizing the educational system, is not allowed to develop any activities that amount to the indoctrination of students with a particular religious or moral view of life contrary to the convictions of their parents.<sup>11</sup> The case related to the implementation of a new system of sex education in public schools, with the purpose of preventing undesired pregnancies among teenagers.<sup>12</sup> Some parents had conscientiously objected to this teaching, for they considered sex education to be the exclusive domain of parents.<sup>13</sup> The *Kjeldsen* decision was taken in the light of Article 2 of the First Protocol. Subsequently, the same doctrine was applied to Article 9 ECHR—freedom of religion protects against indoctrination in a particular religion by the State, be it in the field of education or in any other activity in which the State has assumed responsibility.<sup>14</sup>

It is worth noting that the inviolability of the freedom of choice with regard to religion or belief has been recognized above all in its strictly internal dimension. Instead, the Strasbourg jurisprudence—more precisely the European Commission of Human Rights—has repeatedly refused to accept that Article 9 confers any right to make a formal statement of one's religious choice (or of its modification) in a public record, at least as far as there is no evidence of the practical consequences which that formal statement—or its inexistence—would have for the exercise of religious freedom. Thus, it has been held that Article 9 of the ECHR is not violated by the fact that there are no civil authorities competent to declare the registration of a Christian baptism in the ecclesiastical record null and void,<sup>15</sup> nor when school authorities decline to indicate a student's religion in his record,<sup>16</sup> nor when penitentiary authorities

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<sup>11</sup> *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) (1976).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* This was the first case decided by the Court with respect to religious beliefs, and the only one until the *Kokkinakis* case in 1993. The decision was in favor of the Danish State; the Court held that, although the school curricula were contrary to the applicants' moral beliefs, Danish education authorities had not pursued any aim of indoctrination. *Id.*

<sup>14</sup> *Angelini v. Sweden*, App. No. 10491/83, 51 Eur. Comm'n H.R. Dec. & Rep. 41, 48 (1986).

<sup>15</sup> *See X v. Iceland*, App. No. 2525/65, 22 Collection of Decisions of the Eur. Comm'n 33, 34 (1967).

<sup>16</sup> *See Dec. Adm. on App. No. 3502/68*, in 5 DIGEST OF STRASBOURG CASE-LAW RELATING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 821 (1984).

refuse to modify the data concerning the religious affiliation of an inmate.<sup>17</sup> In all those cases, the Commission declared the applications inadmissible, based on the lack of practical relevance of the formal statements required by the applicants. In this regard, it seems that the Commission understood practical relevance as equivalent to legal effects.

On the other hand, the ECtHR has affirmed, in *Buscarini*, that freedom to choose one's religion or belief implies the freedom not to declare allegiance to a particular faith.<sup>18</sup> The application had been lodged by two newly elected members of Parliament of San Marino (General Grand Council) who argued that the law requiring them to swear on the Gospels—on pain of forfeiting their parliamentary seats—was contrary to their freedom of thought, conscience and religion.<sup>19</sup> The Court stated that the contested legal obligation was tantamount to compelling a citizen to express a religious belief against his will as a requirement to hold a public office voluntarily assumed.<sup>20</sup> And that requisite, in spite of the historical and social justifications provided by the respondent government, could by no means be considered a limitation on religious freedom that pursued a legitimate aim necessary in a democratic society; therefore it would be incompatible with Article 9 ECHR.<sup>21</sup>

A different doctrine, however, was applied two years before, in the cases *Efstathiou* and *Valsamis*. The applicants were two secondary school students, both followers of the Jehovah's Witnesses, who had refused, for religious reasons, to participate in the school parades organized during the national festival to commemorate the outbreak of war between Greece and Fascist Italy in 1940.<sup>22</sup> They argued that their conscience prohibited them from being present in a civic celebration in which a war was remembered and in which military and ecclesiastical authorities took part.<sup>23</sup> The two students were denied permission to be absent from the parade, and their failure to attend was punished by one day's suspension from school.<sup>24</sup> The ECtHR decided the case

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<sup>17</sup> See Dec. Adm. on App. No. 2835/66, in 3 DIGEST OF STRASBOURG CASE-LAW RELATING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 370 (1984); *X v. The United Kingdom*, App. No. 7291/75, 11 Eur. Comm'n H.R. Dec. & Rep. 55 (1977).

<sup>18</sup> *Buscarini and others v. San Marino*, 1999-I Eur. Ct. H.R. 605.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* The challenged law of San Marino was changed shortly after the facts alleged in the application took place. A statute of 1993, following the practice of many European countries, introduced a choice between the traditional oath and one in which the reference to the Gospels was replaced by the words "on my honor."

<sup>22</sup> *Efstathiou v. Greece*, 27 Eur. Ct. H.R. 2347 (1996); *Valsamis v. Greece*, 27 Eur. Ct. H.R. 2312 (1996).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* The texts of both decisions are almost identical, as indeed were the facts in issue.

in the light both of article 9 ECHR and of Article 2 of the First Protocol (as interpreted in *Kjeldsen*). The decision sustained the Greek government's position, considering especially two facts. One was the moderate punishment imposed to the students, which could not amount to a deprivation of the right to education. The other was that the Court could "discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the applicants' pacifist convictions".<sup>25</sup> Apparently, the ECtHR deemed that the applicants' religious freedom had been sufficiently respected by the fact that they were usually exempted from religious-education lessons and from the Orthodox Mass.

Against that reasoning, two judges wrote a dissenting opinion emphasizing that the Court had failed to perceive, or to attribute enough significance to, the symbolism implicit in the commemorative national events, which was contrary to the religious and philosophical convictions deeply held by the applicants and their parents. In that context, despite the historical and cultural reasons that—according to the Greek government—justified the compulsory attendance to the parade, the applicants felt themselves "obliged to show publicly, by their acts, that they adhere[d] to beliefs contrary to those of their parents."<sup>26</sup>

### III. THE KEY CONCEPTS OF ARTICLE 9(2) ECHR

As stated, there are three key concepts that, according to Article 9(2), may justify a limitation on the exercise of religious freedom by individuals or by religious groups. Once the Court has found an interference with one of the rights set forth by the ECHR, its analysis usually conforms to the following pattern. First, it is necessary to verify that the measure that amounts to an interference is *prescribed by law*. Second, the measure must pursue one of the *legitimate aims* enunciated by the ECHR; these aims are, in the case of religious liberty, the protection of public order, morals, safety or health, and the protection of the rights and freedoms of others. Third, the measure under scrutiny must be *necessary in a democratic society*.

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<sup>25</sup> *Efstathiou v. Greece*, *supra* note 22, at 2359–60; *Valsamis v. Greece*, *supra* note 22, at 2324–25.

<sup>26</sup> *See id.* The dissenting judges concluded: "we find no basis for seeing [the applicants'] participation in this parade as necessary in a democratic society, even if this public event clearly was for most people an expression of national values and unity." *Id.* This analysis shows some interesting analogies with the U.S. Supreme Court's way of reasoning in *Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), the decision that put an end to the flag salute cases in the United States.

The general principles of interpretation of these concepts have been developed by the ECtHR with reference to Articles 8, 10 and 11 rather than with reference to article 9—the second paragraphs of those four Articles follow a similar pattern and use analogous concepts.<sup>27</sup> This is mainly due to the fact that the ECtHR has been deciding cases related to freedom of religion or belief only in the last ten years—since the *Kokkinakis* case in 1993.<sup>28</sup> Before that, most applications based upon Article 9 were declared inadmissible by the Commission. By the time the Court began to judge on the merits of applications based on religious freedom, there was a well-established doctrine on the permissible limitations on the freedom of expression, the freedom of assembly and association, and the right to private and family life.

I shall try to describe succinctly, in the next pages, the general interpretive principles adopted by the ECtHR on the legitimate restrictions on the freedoms enshrined in Articles 8-11 ECHR.

A. *The Need for a Narrow Interpretation of Permissible Limitations on Freedoms*

The first and fundamental criterion is the need for a narrow construction of legitimate limitations, which goes hand in hand with the need for a broad construction of the freedoms protected by the European Convention. This seems to be the most sensible doctrine applicable to the understanding of human rights,<sup>29</sup> and has indeed inspired the reasoning of the ECtHR when interpreting Article 10 and Article 11 (freedom of expression and freedom of association). In a democratic society—the Court has affirmed—protection of the freedom to express an opinion, even when those opinions “offend, shock or disturb,” is one of the objectives of the freedom of assembly and association.<sup>30</sup> In such a sensitive area, restrictions on freedom of association must be

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<sup>27</sup> See *supra* note 7 and accompanying text.

<sup>28</sup> See *Kokkinakis v. Greece*, *supra* note 9. This case is discussed *infra* Section 4A.

<sup>29</sup> With regard to freedom of religion, this doctrine was explicitly proposed by the General Comment of the Human Rights Committee on article 18 of the 1966 UN International Covenant on Civil and Political Rights. The Committee adopted the General Comment on article 18 on 30 July 1993 (U.N. Doc. CCPR/C/21/Rev.1/Add.4, General Comment No. 22 (1993)). For an analysis of the text, see BAHIYYIH G. TAHZIB, FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION 307–75 (1995).

<sup>30</sup> See *United Communist Party of Turkey v. Turkey*, App. No. 19392/92, §§ 42–43 (1998), at [www.echr.coe.int/eng](http://www.echr.coe.int/eng); *Socialist Party of Turkey and Others v. Turkey*, App. No. 26482/95, § 41 (1998), at [www.echr.coe.int/eng](http://www.echr.coe.int/eng); *Freedom and Democracy Party (ÖZDEP) v. Turkey*, 1999-VIII Eur. Ct. H.R. 293, 313; *Sidiropoulos and Others v. Greece*, 1998-IV Eur. Ct. H.R. 1594, 1614–15.



“construed strictly” and can be justified only by “convincing and compelling reasons.”<sup>31</sup>

Naturally, that reasoning is also applicable to the freedom of thought, conscience, and religion. This is logical, because these provisions of the Convention are all aimed at protecting pluralism, without which—as the Court has repeatedly emphasized—democracy cannot exist. In fact, the ECtHR has clearly stated that religious liberty is one of the foundations of a pluralistic and democratic society.<sup>32</sup> Nevertheless, it is possible to observe in the Strasbourg case law, and particularly in the Commission’s jurisprudence, a certain tendency to construe restrictively the scope of protection of Article 9(1) ECHR, which implies a lesser resource to the limitation concepts contained in Article 9(2). In short, its analysis can be summarized as follows: it is not necessary to consider whether the State can provide a legitimate justification for the legislation under attack, according to Article 9(2), because the right to freedom of thought, conscience and religion enshrined in Article 9(1) has not actually been violated.

This is especially true when freedom of conscience is in conflict with the so-called neutral laws; that is, laws that pursue legitimate secular goals and are not directly aimed at restricting the manifestation, the worship, or the expansion of certain or of all religions. In those cases, the reference of Article 9(1) to the freedom to manifest one’s religion or belief in “practice” has been interpreted in light of a distinction—allegedly clear, in the Commission’s view—between *manifestation* and *motivation*. Only the former would be protected by Article 9; in other words, the term “practice” does not include each and every act motivated or influenced by a religion or belief.<sup>33</sup> That

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<sup>31</sup> *See id.*

<sup>32</sup> “[F]reedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.” *Kokkinakis v. Greece*, *supra* note 9, at 17. *See also* *Serif v. Greece*, 1999-IX Eur. Ct. H.R. 73, 87.

<sup>33</sup> The Court accepted explicitly this idea in *Kalaç v. Turkey*, 41 Eur. Ct. H.R. 1199, 1209 (1997), § 27 (compulsory retirement of a Turkish officer because of his engagement in an Islamic fundamentalist group; *see infra* note 61 and accompanying text. That doctrine had been repeatedly enunciated by the European Commission of Human Rights. *See* *Pat Arrowsmith v. United Kingdom*, App. No. 7050/75, 19 Eur. Comm’n H.R. Dec. & Rep. 5, 19–20 (1978) (concerning a British pacifist sentenced to a term of imprisonment for having distributed illegal leaflets among English soldiers in Northern Ireland); *C. v. United Kingdom*, App. No. 10358/83, 37 Eur. Comm’n H.R. Dec. & Rep. 142, 147 (1983) (conscientious objection to paying taxes, in the percentage of the State budget aimed at military costs); *V. v. the Netherlands*, App. No. 10678/83, 39 Eur. Comm’n H.R. Dec. & Rep. 267, 268 (1984) (conscientious objection to contributing to the public system of pensions); *Khan v. United Kingdom*, App.

distinction, which seems reasonable in the abstract, has been utilized sometimes by the Commission to endorse a rather restrictive understanding of the protection that Article 9 ECHR offers to an individual who endeavors to follow the mandates of his conscience in ordinary life, particularly when his behavior does not strictly consist of religious teaching or correspond to specific ceremonial practices.<sup>34</sup> The Commission has thus ignored that, when the legal duties imposed by a neutral law collide with the moral obligations of certain individuals, those persons see their right to practice their religion or belief as being indirectly and nonetheless unavoidably restricted by that law, for a moral burden is placed upon the shoulders of these people—they must choose between disobedience to the law and disobedience to their conscience.

It would be premature to affirm that there is a conclusive doctrine of the ECtHR on the issue of conflicts between neutral laws and individuals' freedom of conscience. However, in three cases already mentioned, it is possible to observe some traces of the foregoing way of reasoning.<sup>35</sup> In *Kjeldsen*, the parents' rights to decide the religious and philosophical orientation of their children's education (Article 2 of Protocol n. 1) were restrictively interpreted as merely prohibiting the State from pursuing an aim of indoctrination of students in a particular religious or moral view of life.<sup>36</sup> In *Efstratiou* and *Valsamis*, the Court made ambiguous references to the Commission's report on the case, which affirmed that "Article 9 did not confer a right to exemption from disciplinary rules which applied generally and in a neutral manner."<sup>37</sup> That assertion was neither confirmed nor rejected by the Court, which in any event declared that there was no interference with the applicants' religious freedom because the civic celebration in which the Jehovah's Witnesses

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No. 11579/85, 48 Eur. Comm'n H.R. Dec. & Rep. 253, 255 (1986) (conflict between the laws governing religious and civil marriages); *Raoult v. France*, App. No. 14049/88, unpublished (conscientious objection to paying taxes, in the percentage of the State budget aimed at financing legal abortions in France).

<sup>34</sup> For further details on this approach of the European Commission of Human Rights, see Javier Martínez-Torrón, *La giurisprudenza degli organi di Strasburgo sulla libertà religiosa*, 6 RIVISTA INTERNAZIONALE DI DIRITTI DELL'UOMO 335-79 (1993).

<sup>35</sup> Significantly, all three cases referred to problems arising within the educational environment, which might lead one to consider them as right to education cases rather than freedom of religion cases.

<sup>36</sup> See *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, *supra* note 11 and accompanying text. The interpretation of Article 2 of the Protocol n. 1 proposed by the Court was strongly criticized in the dissenting opinion written by Judge Verdross. *Id.*

<sup>37</sup> *Efstratiou v. Greece*, *supra* note 22, § 37; *Valsamis v. Greece*, *supra* note 22, § 36. See *supra* notes 22-27 and accompanying text.

refused to participate had nothing in it which could offend their beliefs—thus substituting its own judgment for the applicants' judgment of conscience.<sup>38</sup>

*B. Limitations Must Be "Prescribed by Law" and "Necessary in a Democratic Society"*

The expression "prescribed by law" is aimed to prevent national authorities from acting with full discretion against activities that they consider harmful to the public interest. This does not prevent administrative authorities from adopting concrete measures within a general framework of competences previously granted by law,<sup>39</sup> but in those cases the law must indicate the scope and manner in which administrative discretion has to be exercised; it is not acceptable that the law confer uncontrolled power to administrative authorities.<sup>40</sup>

On the other hand, in the context of paragraph 2 of Articles 8-11,<sup>41</sup> "law" has to be interpreted in a broad sense, inclusive of the meaning of that word both in the civil law and in the common law traditions. That is, "law" is not synonymous with legislation or statutory law; it comprises also judge-made law.<sup>42</sup> What is essential is that the principle of legal certainty is respected.

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<sup>38</sup> *Efstathiou v. Greece*, *supra* note 22, §§ 32-34 and 38-39; *Valsamis v. Greece*, *supra* note 22, §§ 31-33 and 37-38.

<sup>39</sup> This has been affirmed in numerous decisions of the Commission. *E.g.* *X. v. Austria*, 1965 Y.B. Eur. Conv. On H.R. 174 (Eur. Comm'n on H.R.); *X. v. United Kingdom*, App. No. 5442/72, 1 Eur. Comm'n H.R. Dec. & Rep. 41 (1974); *X. v. United Kingdom*, App. No. 8010/77, 16 Eur. Comm'n H.R. Dec. & Rep. 101 (1979); *A.R.M. Chappell v. United Kingdom*, App. No. 12587/86, 53 Eur. Comm'n H.R. Dec. & Rep. 241 (1987).

<sup>40</sup> "In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise." *Hasan and Chaush v. Bulgaria*, 2000-XI Eur. Ct. H.R. 117, 143. *See also*, with regard to Article 8, *Malone v. United Kingdom*, 82 Eur. Ct. H.R. (ser. A) (1984).

<sup>41</sup> It should be noted that the English version of the ECHR utilizes the expression "prescribed by law" in Articles 9-11, and the expression "in accordance with the law" in Article 8. ECHR, *supra* note 4, art. 8. Instead, the French version of the text, which is equally authentic, utilizes the expression "prévues par la loi" in all cases. *Id.* The ECtHR has traditionally endeavored to provide the coordinated interpretation of both versions of the Convention that seems most adequate to the particular circumstances of the case. *See The Sunday Times Case*, 30 Eur. Ct. H.R. (ser. A) at 30 (1978). *See also Wemhoff v. Germany*, 1968 Eur. Ct. H.R. (ser. A) at 23.

<sup>42</sup> "[T]he word 'law' in the expression 'prescribed by law' covers not only statute but also unwritten law. Accordingly, the Court does not attach importance here to the fact that contempt of court is a creature of the common law and not of legislation. It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not 'prescribed by law' on the sole ground that it is not enunciated in legislation: this would deprive a common-law State which is Party to

Legal certainty, in turn, requires that applicable law, be it statutory law or judge-made law, is adequately accessible to the citizens and that the relevant rules are formulated with sufficient precision to enable citizens to regulate their own conduct.

In other words, the central requirements that legislative or judicial rules must meet to be considered “law” are *accessibility* and *foreseeability*. Citizens must have access to those rules in reasonable terms so that they can foresee the legal consequences of their actions. Naturally, the ideal of legal certainty must be made compatible with the need for flexibility. In order to cover a wide variety of situations and to have the desirable stability in a changing society, laws are often couched in general terms that call for an interpretation by the courts or even by administrative regulations.<sup>43</sup> As a consequence, a law written in general terms—for example, criminal-law provisions—can not be considered imprecise or unforeseeable when there exists a body of settled national case law that has been published and is accessible.<sup>44</sup>

The sense of the expression “democratic society” is sufficiently clear. It means, according to the doctrine of the ECtHR, a society based upon the guarantee of pluralism and upon the supremacy of law.<sup>45</sup> In other words, a society whose legal and political values correspond to those inspiring the ECHR.

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the Convention of the protection of Article 10 (2) . . . and strike at the very roots of that State’s legal system.” *The Sunday Times Case*, *supra* note 42, at 30.

<sup>43</sup> “[T]he following are two of the requirements that flow from the expression ‘prescribed by law’. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.” *Id.* at 31. On the idea that administrative rules may serve for determining the sense of a generic law, thus making that law sufficiently precise, *see Silver and others v. United Kingdom*, 61 Eur. Ct. H.R. (ser. A) at 33–34 (1983).

<sup>44</sup> *See Kokkinakis v. Greece*, *supra* note 9, at 19. In this case, the relevant laws were some legal provisions criminalizing proselytism in Greece, which dated back to 1938 and had been declared compatible with the 1975 Constitution by the Greek courts (*see infra* section 4.A). The ECtHR held that, despite the vagueness of the wording utilized by the legislation, there was an abundant case law that determined which conducts could be considered illegal proselytism. *Id.*

<sup>45</sup> *See Handyside Case*, 24 Eur. Ct. H.R. (ser. A) at 23 (1976). More recently, *see* the decisions cited *supra* note 31. With specific reference to religious freedom, *see Kokkinakis v. Greece*, *supra* note 9, at 17.

Finally, in order to consider a limitation “necessary,” the Court has long since stated that this adjective is not equivalent to the terms “indispensable,” “absolutely necessary” or “strictly necessary,” as utilized in other Articles of the Convention.<sup>46</sup> But, at the same time, it can not be attributed the flexibility of such expressions as “admissible,” “ordinary,” “useful,” “reasonable” or “desirable.”<sup>47</sup> In the interpretation of the Court, the word “necessary” implies the existence of a “pressing social need,” which can not be determined in the abstract but *ad casum*, after evaluating diverse factors.<sup>48</sup> Among such factors are the nature of the right involved and the degree of interference in its exercise, the nature of the activities subjected to restriction, the nature of the public interest that allegedly justifies the limitation on freedoms, and the level of protection which that interest requires in the precise circumstances of the case.<sup>49</sup> The restrictive measures adopted by national authorities, ultimately, are deemed necessary when they are “proportionate to the legitimate aim pursued.”<sup>50</sup>

### C. The ‘Margin of Appreciation’ Doctrine

The ambiguities implicit in the foregoing terminological jungle, in the end, expose that this matter calls for the search of an adjustment between the supranational guarantee of human rights that is the purpose of the Convention and the respect for the particularities characteristic of each and every national legal order—particularities that also reflect a specific concept of the protection of public interest. The efforts of the ECtHR to reach a balance between those two elements have materialized in the doctrine of the ‘margin of appreciation’. The actual effect of this doctrine has been to understand the expression “necessary” in relative terms, leaving its determination to the prudence of the European Court when it decides on each particular case subject to its jurisdiction.<sup>51</sup>

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<sup>46</sup> See, e.g., ECHR, *supra* note 4, art. 2(2), art. 6(1), art. 15(1) Articles.

<sup>47</sup> See, e.g., *id.* art. 1(3), 5(3), 6(1).

<sup>48</sup> See *Handyside Case*, *supra* note 46, at 22; *The Sunday Times Case*, *supra* note 42, at 35; *Dudgeon Case*, 45 Eur. Ct. H.R. (ser. A) at 21 (1982); *Lingens v. Austria*, App. No. 9815/82, § 39 (1986), at [www.echr.coe.int/eng](http://www.echr.coe.int/eng).

<sup>49</sup> See *id.*

<sup>50</sup> See *Handyside Case*, *supra* note 46, at 23. (discussing the freedom of expression); *Case of Young, James and Webster*, 44 Eur. Ct. H.R. (ser. A) at 25 (1981) (discussing freedom of association); *Dudgeon Case*, *supra* note 49, at 21 (discussing the right to respect for private and family life); *Kokkinakis v. Greece*, *supra* note 9, at 21 (discussing freedom of religion).

<sup>51</sup> The margin of appreciation doctrine was enunciated explicitly for the first time in the *Handyside Case*, *supra* note 46, at 22–23. However, it was already implicit in previous decisions of the Court. See, e.g. *The*

In brief, that doctrine maintains that, when applying the restrictions on freedom permitted by different articles of the ECHR (especially Articles 8-11), the national authorities of every State must be recognized a reasonable margin of appreciation. The reason is that national authorities, being closer to the respective societies, are in a better position to evaluate the necessity of the restrictive measures adopted and can better appraise the needs of the public interest and interpret the relevant domestic law.<sup>52</sup> That power of appreciation, nevertheless, is not unlimited but must be reconciled with a 'European control' of national authorities' decisions, which are subject to the European Court's supervision. If national authorities are in a better condition to assess the domestic circumstances—factual and legal—the Court is better qualified to interpret the spirit of the Convention and its consequences with respect to the protection of citizens' freedom.<sup>53</sup> Hence, in reality, there exists a *double* margin of appreciation: the margin that national authorities have to evaluate the necessity of restrictive measures adopted under paragraph 2 of Articles 8-

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Belgian Linguistic Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, 1968 Eur. Ct. H.R. (ser. A) at 46; Case of Engel and others, 22 Eur. Ct. H.R. (ser. A) at 41 (1977). The Handyside case related to the seizure of a book by the British courts for reasons of public morals; the book was entitled "The Little Red Schoolbook" and was intended for school children of the age of twelve and upwards. Handyside Case, *supra* note 46. The seizure of the book was grounded on some chapters on sexual issues that were considered obscene. *Id.* The Court has thereafter repeatedly confirmed the margin of appreciation doctrine, with almost no variation in its general principles.

<sup>52</sup> "[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them . . . . [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context . . . . Consequently, Article 10 §2 . . . leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force." Handyside Case, *supra* note 46, at 22.

<sup>53</sup> "Nevertheless, Article 10 § 2 . . . does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) . . . , is empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10 . . . . The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its 'necessity'; it covers not only the basic legislation but also the decision applying it, even one given by an independent court. . . . [I]t is in no way the Court's task to take the place of the competent national courts but rather to review under Article 10 . . . the decisions they delivered in the exercise of their power of appreciation." Handyside Case, *supra* note 46, at 23-24.

11 ECHR, and the margin that the European Court has to review the compatibility of those measures with the Convention.<sup>54</sup>

In subsequent decisions, the ECtHR has added some nuances to its doctrine, especially emphasizing that the margin of appreciation of national States varies depending on two factors. First, the different aims pursued by the relevant restrictive measure; some aims are more susceptible to an objective analysis than others; a bigger objectivity calls for a lesser discretion on the part of national authorities.<sup>55</sup> Second, the nature of the activities subjected to limitation; when they concern strictly an individual's private life—and not so much the community—the State's margin of appreciation lessens while the ECtHR's power of control increases, and, at the same time, “particularly serious reasons” are required to consider that a State interference has been legitimate.<sup>56</sup>

It is perhaps worth noting that the margin of appreciation doctrine was created by the Court—under the initiative of the Commission<sup>57</sup>—when the Council of Europe gathered a reduced number of States that shared a relatively uniform concept of democracy and civil liberties. In that context, the doctrine of the margin of appreciation, together with the actual recognition of a wide margin of discretion to national authorities, was probably a sensible solution to harmonize the power of the member States and the power of a supranational court that was still young (the ECtHR began its activities in 1959). However, after more than four decades, and, above all, after the Council of Europe has been enlarged with the incorporation of post-communist countries—which do not have the same democratic tradition as Western Europe—it is natural to expect that the Court should be willing to exercise its power of supervision in

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<sup>54</sup> See Tullio Scovazzi, *Diritti dell'uomo e protezione della morale nella giurisprudenza della Corte Europea*, in *LA TUTELA DELLA LIBERTÀ DI RELIGIONE. ORDINAMENTO INTERNAZIONALE E NORMATIVE CONFENSIONALI* 88 *et seq.* (Silvio Ferrari & Tullio Scovazzi eds., 1988).

<sup>55</sup> See *The Sunday Times Case*, *supra* note 42, at 35–37. In this case, British authorities justified the restrictive measure alleging the need to maintain the “authority of the judiciary,” an aim that the Court compared with the less objective concept of “protection of morals,” which was the main issue in *Handyside*—both aims are mentioned by Article 10(2). *Id.* The measure under scrutiny in *The Sunday Times* was an injunction restraining the publication of an announced article on the thalidomide tragedy. *Id.* More precisely, the article criticized the agreements reached by the company that manufactured and marketed the drug and the parents of the injured children, being the matter still *sub iudice*. *Id.*

<sup>56</sup> See *Dudgeon Case*, *supra* note 49, at 21. The case related to the existence in Northern Ireland of laws which have the effect of making certain homosexual acts between consenting adult males criminal offences. *Id.* The decision, in favor of the applicant, was adopted under Article 8 ECHR.

<sup>57</sup> See W. GANSHOF VAN DER MEERSCH, *Réflexions sur les méthodes d'interprétation de la Cour européenne des Droits de l'homme*, 11 *BOLETIM DO MINISTÉRIO DA JUSTIÇA* 119 (1982). In this regard, the Commission's report in *The Belgian Linguistic Case*, § 400, is particularly significant.

stricter terms. Indeed, this seems to be the case as far as religious freedom is concerned, as demonstrated by the spectacular increase in the number of decisions adopted under Article 9 in the last ten years.<sup>58</sup>

*D. Legitimate Aims under Article 9(2)*

As indicated before, the ECtHR must verify that the restrictive measures adopted by national authorities are proportionate to some of the legitimate aims indicated in the relevant provision of the ECHR. An interesting point with respect to the general interpretation of permissible limitations on the rights enshrined in the ECHR is the fact that the Court has rejected that those limitation-concepts are necessarily univocal. On the contrary, they may acquire a particular meaning in certain reduced environments, with the effect of enlarging the margin of appreciation of State authorities. The two main examples are the armed forces and penitentiaries.

With regard to the former, the ECtHR stated, in *Engel*, that “a system of military discipline . . . by its very nature implie[s] the possibility of placing on certain of the rights and freedoms of the members of these forces limitations incapable of being imposed on civilians.”<sup>59</sup> More than twenty years later, the *Kalaç* case applied that doctrine explicitly to the right of religious freedom. In it the Court supported the position of the Turkish government, whose military authorities had decreed the compulsory retirement of an officer for adhering to an Islamic fundamentalist group and manifesting opinions and behavior contrary to the constitutional principle of secularism.<sup>60</sup> The doctrine of *Kalaç* has been subsequently used to declare inadmissible a number of similar cases.<sup>61</sup>

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<sup>58</sup> As indicated before, *Kokkinakis*, in 1993, was the first case decided under Article 9. Most applications based on that article were declared inadmissible by the Commission (prior to *Kokkinakis*, the only decision adopted with reference to freedom of religion had been *Kjeldsen*, in 1976, adopted under Article 2 of Protocol n. 1). Since 1993, the Court has decided close to thirty cases related to religious liberty in one way or another.

<sup>59</sup> Case of *Engel and others*, *supra* note 52, at 24.

<sup>60</sup> *Kalaç v. Turkey*, *supra* note 34, at 1209. The Court noted that the applicant had been permitted to fulfill the normal religious obligations of Muslims, but emphasized that “States may adopt for their armies disciplinary regulations forbidding this or that type of conduct, in particular an attitude inimical to an established order reflecting the requirements of military service.” *Id.*

<sup>61</sup> See, among others, the declarations of inadmissibility of Apps. No. 32323/96 (*Demir*), 34537/97 (*Fidan*), 35829/97 (*Kiratoğlu*), 35856/97 (*Uludağ*), 35976/97 (*Tan*), 36193/97 (*Apuhan*), 38385/97 (*Kahramanyol*), 38918/97 (*Davuter*), 38920/97 (*Karaca*), 38930/97 (*Zülfikaroğlu*), 39068/97 (*Tahta*), 39070/97 (*Usta*), 39071/97 (*Işık*). All those applications were against Turkey, and must be understood within the context of the interest of Turkish government in preserving the armed forces free from Islamic fundamentalist elements.



With respect to the penitentiaries, the Commission has long since accepted the idea that “it is an inherent feature of lawful imprisonment that certain restrictions should be imposed on a prisoner’s freedom to exercise” the right to freedom of religion and freedom of expression.<sup>62</sup> For that reason, the Commission has sustained the position of the prison authorities when inmates had been deprived of a prayer-chain,<sup>63</sup> or of a book on Far East philosophical doctrines containing an illustrated section on martial arts;<sup>64</sup> and also when an inmate had been obliged to clean his cell against his alleged religious beliefs as a Sikh.<sup>65</sup> Those measures were justified by the Commission as necessary, within the penitentiary environment, for the protection of the public order, safety, or of the rights and freedoms of others.

In the next section of this paper I will refer in detail to the main issues raised before the Strasbourg jurisdiction with regard to limitations on freedom of religion. Now, I would like to mention briefly, by way of example, some decisions of inadmissibility taken by the European Commission according to Article 9(2) ECHR.

The needs of *public safety* were alluded to by the Commission when rejecting the applications filed by an IRA member who had received a criminal penalty for distributing ‘pacifist’ leaflets among the British soldiers quartered in Northern Ireland,<sup>66</sup> and by individuals punished for engaging in activities aimed at founding neo-nazis or neo-fascist associations.<sup>67</sup> *Public health* has been invoked to endorse the legal obligation of registering in a national service aimed at the prevention of bovine tuberculosis,<sup>68</sup> the prohibition of feeding pigeons in the city streets,<sup>69</sup> and the traffic authorities’ refusal to grant a Sikh an exemption from wearing the compulsory protection helmet when riding on a motorcycle.<sup>70</sup> The *protection of the rights and freedom of others* has been mentioned to support the internment of a mentally retarded minor in a special

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<sup>62</sup> Huber v. Austria, 1971 Y.B. Eur. Conv. On H.R. 548, 568 (Eur. Comm’n on H.R.).

<sup>63</sup> See X. v. Austria, *supra* note 40, at 184.

<sup>64</sup> See X. v. United Kingdom, App. No. 6886/75, 5 Eur. Comm’n H.R. Dec. & Rep. 100 (1976).

<sup>65</sup> See X. v. United Kingdom, App. No. 8231/78, 28 Eur. Comm’n H.R. Dec. & Rep. 5 (1982).

<sup>66</sup> X. v. United Kingdom, App. No. 6084/73, 3 Eur. Comm’n H.R. Dec. & Rep. 62 (1975). Public order was also mentioned. *Id.*

<sup>67</sup> X. v. Austria, 1963 Y.B. Eur. Conv. On H.R. 424, 442 (Eur. Comm’n on H.R.); X. v. Italy, App. No. 6741/74, 5 Eur. Comm’n H.R. Dec. & Rep. 83 (1976).

<sup>68</sup> X. v. The Netherlands, 1962 Y.B. Eur. Conv. On H.R. 279, 284 (Eur. Comm’n on H.R.).

<sup>69</sup> Cf. Dec. Adm. on App. No. 9101/80, in 3 DIGEST OF STRASBOURG CASE-LAW RELATING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 376 (1984).

<sup>70</sup> X. v. United Kingdom, App. No. 7992/77, 14 Eur. Comm’n H.R. Dec. & Rep. 234 (1978).

educational center against the convictions of his parents;<sup>71</sup> the dismissal of a teacher who spread his religious ideas in a public non-denominational school;<sup>72</sup> the absolute mandatory character of automobile insurance for damages to third persons;<sup>73</sup> and the imposition of a fine to a person who, following the dictates of his conscience, gave refuge to a minor who had escaped from her parents' home.<sup>74</sup>

*Public order*, as stated, has been referred to in applications regarding factual situations within the military or penitentiary environment.<sup>75</sup> It was also the ground utilized to declare inadmissible the application of the "Secular Order of Druids," which claimed that British authorities had violated Article 9 ECHR when prohibiting the "Stonehenge Free Festival," organized on the summer solstice.<sup>76</sup> *Public morals*, curiously, has never been mentioned by the Commission in applications based on Article 9, in spite of being, among the limitation-concepts listed in Article 9(2), the one that is closest to religious freedom; the morals of every society are strongly influenced by its religious history, and consequently the fact that freedom of religion or belief can be restricted on the ground of ethical ideas of a clear religious origin could raise some questions from the perspective of the interpretation of Article 9 ECHR.

In any event, it is worth noting that, with respect to the general notion of public morals, the Court has emphasized the changing and local character of that concept. As there is not a "uniform European conception of morals," the State's margin of appreciation tends to be broader in this field.<sup>77</sup> In particular, national legislators may enact laws aimed at the protection of "the moral ethos or the moral standards of a society as a whole," and may also adopt measures to safeguard certain social groups, as minors, that may be more "vulnerable," or "in need of special protection for reasons such as lack of maturity, mental

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<sup>71</sup> Graeme v. United Kingdom, App. No. 13887/88, at [www.echr.coe.int/eng](http://www.echr.coe.int/eng). (the Commission referred to the child's right to receive an education proportionate to his capacity).

<sup>72</sup> X. v. United Kingdom, App. No. 8010/77, 16 Eur. Comm'n H.R. Dec. & Rep. 101 (1979) (addressing the right of the students' parents to have their children educated according to their own religious and philosophical convictions).

<sup>73</sup> X v. The Netherlands, 1967 Y.B. Eur. Conv. On H.R. 471, 476 (Eur. Comm'n on H.R.) (addressing the protection of the rights of the possible victims of a traffic accident).

<sup>74</sup> X. & Y. v. the Netherlands, App. No. 6753/74, 2 Eur. Comm'n H.R. Dec. & Rep. 118 (1974) (addressing the protection of the rights of the minor and her family).

<sup>75</sup> See *supra* the decisions cited in notes 63-66.

<sup>76</sup> A.R.M. Chappell v. United Kingdom, App. No. 12587/86, 53 Eur. Comm'n H.R. Dec. & Rep. 241 (1987).

<sup>77</sup> See Handyside, *supra* note 46, at 22.

disability or state of dependence.”<sup>78</sup> On the other hand, it has been pointed out that sometimes the State attempts to protect the ethics of a society by way of principles; in other words, through laws that are considered primarily as a ‘moral point of reference’, for violations of such laws are neither controlled nor punished systematically (only a few infringements are prosecuted sporadically, as exemplary cases). In those situations, the important question is which can be considered the true ethos of the community: the one explicit in the unapplied law or the one implicit in the general social tolerance for certain behaviors that are formally illegal?<sup>79</sup>

#### IV. THE MAIN ISSUES CONCERNING LIMITATIONS ON RELIGIOUS FREEDOM RAISED BEFORE THE EUROPEAN COURT

As stated before, in the last decade, the ECtHR has decided a number of cases related to freedom of thought, conscience and religion. In the following sections I shall describe the main issues raised before the European Court in these years with respect to the limitations on religious freedom (and I shall provide also, when appropriate, some references to decisions previously adopted by the European Commission of Human Rights before its extinction in 1998).

##### A. *Proselytism*

Proselytism was the central issue in *Kokkinakis*, the first case decided under Article 9 ECHR, which broke thirty four years of the European Court’s silence on the subject.<sup>80</sup> The Court held that Article 9 includes the right of individuals and religious groups to spread their doctrines and to gain new followers through proselytism, provided that they do not use abusive, fraudulent or violent means.<sup>81</sup>

The facts were as follows. An elderly man, a member of the Jehovah’s Witnesses, had been arrested and subsequently sentenced by the Greek courts

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<sup>78</sup> Dudgeon Case, *supra* note 49, at 20.

<sup>79</sup> See Scovazzi, *supra* note 41, at 101.

<sup>80</sup> *Kokkinakis v. Greece*, *supra* note 9. For a detailed comment on this significant decision, see T. Jeremy Gunn, *Adjudicating Rights of Conscience Under the European Convention on Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVES 305 (Johan D. van der Vyver & John Witte, Jr., eds., 1996); Javier Martínez-Tortón, *Libertad de proselitismo en Europa. A propósito de una reciente sentencia del Tribunal europeo de derechos humanos*, QUADERNI DI DIRITTO E POLITICA ECCLESIASTICA 59–71 (1994/1).

<sup>81</sup> *Kokkinakis v. Greece*, *supra* note 9.

under a law that declares proselytism a crime.<sup>82</sup> This law, enacted in 1938 (under the Metaxas government), corresponded to the constitutional ban on proselytism, dating back to 1844 and maintained in the 1975 Constitution.<sup>83</sup> Both provisions are aimed at protecting the social status of the Greek Orthodox Church. The sort of proselytism the applicant was engaged in was door-to-door evangelism. More precisely, he had initiated a conversation on religious topics with the wife of a cantor at a local Orthodox church, in whose home he had been freely admitted without revealing previously his religious affiliation or his evangelizing purposes.<sup>84</sup> Prior to that date, Mr. Kokkinakis had been arrested more than sixty times for proselytism and had been sentenced to imprisonment on several occasions.<sup>85</sup>

The crucial question, therefore, was whether the right to proselytism was an integral part of freedom of religion and up to what extent a State can limit that right. In this respect, the Court affirmed that the right to manifest one's religion or belief includes, by nature, the right to try to convince and attract other people to one's beliefs.<sup>86</sup> As a consequence, whenever this right was restricted, as in the contested Greek legislation, there was an interference with the applicant's religious freedom, which must be justified under Article 9(2). In the Court's view, the law criminalizing proselytism was not as such incompatible with the Convention, for it could be construed as pursuing a legitimate aim, namely the protection of the rights and freedom of others. In this regard, it was necessary to draw a distinction between 'proper' and 'improper' proselytism. The latter is aimed at gaining new members for a religious group at any cost, exercising improper pressure on people or even resorting to brainwashing or violence. The prohibition of Greek law was legitimate only as applied to improper proselytism, which can be restricted, according to Article 9(2), for the protection of the religious freedom of others.<sup>87</sup> In the case at issue, however, the Court, after a careful scrutiny of the

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* Indeed, Mr. Kokkinakis had been the first Jehovah's Witness to be convicted under Metaxas laws. *Id.* at 8.

<sup>86</sup> "While religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to 'manifest [one's] religion'. Bearing witness in words and deeds is bound up with the existence of religious convictions. . . . [F]reedom to manifest one's religion . . . includes in principle the right to try to convince one's neighbour, for example through 'teaching', failing which, moreover, 'freedom to change [one's] religion or belief', enshrined in Article 9 . . . would be likely to remain a dead letter." *Id.* at 17.

<sup>87</sup> "[A] distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism . . . The latter represents a corruption or deformation of it. It may,

facts, could not find traces of improper proselytism in Mr. Kokkinakis' behavior, and consequently held that his right to religious liberty had been violated.

The reasoning of the Court has been criticized, for it could suggest that "even *improper* proselytism is a form of manifestation protected by Article 9(1)."<sup>88</sup> At the same time, as an alternative, it has been indicated that the ECtHR could have defined which acts of proselytism, and more generally which manifestations of religion or belief, are an illegitimate exercise of freedom of thought, conscience and religion.<sup>89</sup> In my view, although that proposal seems correct in the abstract, in practice it might prove more problematic than the original problem itself. In effect, the determination of the illegitimate manifestations of religion or belief could be made according to two alternative criteria: 1) every behavior contrary to existing national laws is illegitimate, provided that they are 'neutral' laws, i.e. that they are not directly aimed at restricting the exercise of a particular religion or belief; 2) even when a certain behavior is not declared illegal by a neutral law, the ECtHR could declare this behavior illegitimate for other reasons. Both criteria, however, raise significant operative problems.<sup>90</sup>

With respect to the latter, it would be extremely difficult—and sometimes perhaps impossible—to declare that a manifestation of a religion or belief is illegitimate without declaring illegitimate, or unreasonable, the relevant religion or belief itself. And this is something that the ECtHR should be careful to avoid. Indeed, the Court has explicitly affirmed that "[t]he right to freedom of religion as guaranteed under the Convention excludes any discretion

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according to the same report, take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others. . . . Scrutiny of section 4 of Law no. 1363/1938 shows that the relevant criteria adopted by the Greek legislature are reconcilable with the foregoing if and in so far as they are designed only to punish improper proselytism." *Id.* at 21.

<sup>88</sup> Evans, *supra* note 3, at 334.

<sup>89</sup> "It seems as if the Court, perhaps unwittingly, seriously watered down the right to freedom of thought, conscience and religion. Since it was prepared to assess the degree to which the applicant's behaviour had interfered with the right of the Cantor's wife under Article 9(2), this suggests that even *improper* proselytism is a form of manifestation protected by Article 9(1) since it is only if a right under the Convention is at issue that the legitimacy of its being restricted under Article 9(2) arises. An alternative, and possibly more attractive, way of proceeding would have been to ask whether the act of proselytism in question was a legitimate exercise of the right to manifest one's religion or belief. This, however, would have required the Court to define the difference between a legitimate and an illegitimate exercise of the right to manifestation and it was not prepared to do this." *Id.*

<sup>90</sup> For a more detailed development of the following ideas, see Martínez-Torrón, *supra* note 3, at 116–27.

on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”<sup>91</sup>

The former criterion, in turn, which has indeed inspired part of the Commission and the Court’s case law, could imply a subversion of the spirit of the European Convention. The determination of the legitimacy of certain behaviors would be left in the hands of national laws, which in fact would become predominant over the potential content of Article 9(1). In other words, whenever there were a manifestation of religion or belief banned by a ‘neutral’ national law, the ECtHR would have its hands tied up for it could not declare that manifestation legitimate under Article 9(1)—nor could it, consequently, scrutinize the national law under Article 9(2). The risks for the rights of religious minorities implied in that interpretation of Article 9 are obvious. Apart from the fact that neutral laws are usually inspired by the ethical values dominant in a society—which not rarely have their historical roots in the doctrine of major churches—it might permit some national legislators to enact laws that are formally neutral but are in reality aimed at restricting the expansion of certain minorities. This risk is especially high in countries where a powerful major church can exercise a strong political pressure on the government.

In any event, the European Court has reiterated its doctrine on proselytism in a subsequent case, *Larissis*,<sup>92</sup> related to the proselytizing activities carried on, in the military environment, by three officers of the Greek Air Forces who belonged to the Pentecostal Church; they were convicted under the Greek law for having tried to convert some subordinates as well as some civilians. The Court’s analysis of Article 9(2) was influenced both by its judgment in *Kokkinakis* and by its previous doctrine on the particular characteristics of military life and its effect on the exercise of freedoms by individual members of the armed forces.<sup>93</sup> The Court held that restrictions on proselytism are legitimate when applied in a superior-subordinate relationship; i.e. when a superior tries to convert a subordinate, even if it has been done merely through respectful conversations on religious topics. Such restrictions are justified by the need to avoid the risk that the relationship can degenerate, causing subordinates to act under improper pressure from their superiors. However, restrictions on proselytism are not justified when the same kind of religious

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<sup>91</sup> *Manoussakis v. Greece*, 17 Eur. Ct. H.R. 1346, 1365 (1996). *See also* *Hasan and Chaush v. Bulgaria*, *supra* note 41, at 142.

<sup>92</sup> *Larissis and others v. Greece*, 24 February 1998.

<sup>93</sup> *See supra*, notes 46–48 and accompanying text.

conversation takes place between an officer and a civilian, even if the latter lives within a military environment, because they are not linked by any superior-subordinate relationship.

### *B. Places of Worship*

The European Court has recognized the right of religious groups to possess and manage their own places of worship and meeting. Naturally, this right implies the right to freely attend religious ceremonies in those places. Unjustified restriction of free access to places of worship constitutes a violation of Article 9 ECHR, for it prevents people from manifesting their religion "either alone or in community with others."<sup>94</sup>

At the same time, to deny the right to own places of worship without sufficient justification is incompatible with the European Convention, according to the doctrine of the Court in *Manoussakis and Pentidis*.<sup>95</sup> Both cases arose from applications submitted by Jehovah's Witnesses who claimed that the Greek law on places of worship had been applied to them in a discriminatory and hostile manner. The Greek legislation prescribes that in order to open a public place of worship civil authorities must first grant explicit permission. The alleged aim of the legislation is to ensure that the place is not run by secret sects, that there is no danger to public order or morals, and that the place of worship will not be a cover for acts of proselytism, which is explicitly forbidden by the Greek Constitution.

In *Manoussakis*, the applicants had asked for government permission to set up a place of worship, and they began to utilize the place, as the permit had not been granted within a period of time that they considered being excessive. Criminal proceedings were initiated against them in the Greek courts. After analyzing the relevant legislation, the European Court concluded that it could be construed as pursuing a legitimate aim, namely the protection of public order. Nevertheless, the Court held that the restrictions imposed on Jehovah's Witnesses could not be considered "necessary in a democratic society" and amounted to a violation of Article 9. Three facts were especially relevant to reach that conclusion. First, the Greek authorities had an excessive discretion

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<sup>94</sup> See recently *Cyprus v. Turkey*, 10 May 2001, §§ 241-47. In this case, which has many and complex political implications, the Court found a violation of the right to religious freedom of the Greek-Cypriot community of Northern Cyprus by the Turkish government (within the context of a much more extensive violation of human rights in that part of Cyprus).

<sup>95</sup> *Manoussakis v. Greece*, 26 September 1996; *Pentidis and others v. Greece*, 9 June 1997.

to estimate the need to open a place of worship. Second, the authorities' decision on the permit did not have to be taken within a concrete term, and consequently the proceedings could be extended indefinitely. Third, the Greek Orthodox ecclesiastical authorities intervened in the decision-making process.<sup>96</sup> In addition, the Court noted that evidence showed "a clear tendency on the part of the administrative and ecclesiastical authorities to use [legal] provisions to restrict the activities of faiths outside the Orthodox Church," and in particular the activities of Jehovah's Witnesses.<sup>97</sup>

In *Pentidis*, the applicants had begun to utilize a place of worship and meeting without having required the mandatory administrative permit, and they were consequently prosecuted before the Greek courts. The case, however, ended with a friendly settlement. Pending the case before the ECtHR, the applicants requested the authorization, and the Greek government, after the condemnatory judgment received in *Manoussakis*, granted it in a short time.

### *C. Legal Personality*

One of the issues of increasing significance in Europe is up to what extent freedom of religion includes the right of churches or religious communities to obtain legal personality before the State. Or, from the opposite perspective, up to what extent national legislation or practice may impose legitimate limitations on the acquisition of legal personality by the churches. The ECtHR has decided two interesting cases on this subject in the last years.

The first one is *Canea Catholic Church*.<sup>98</sup> The case related to the Roman Catholic Church of the Virgin Mary in Canea, built in the 13th century, which is the cathedral of the Roman Catholic diocese of Crete. Two people living next to the church had demolished one of the surrounding walls, and opened a window looking onto the church in the wall of their own building. The Greek courts denied that the applicant church had capacity to bring legal proceedings, as it had not complied with the formal requirements generally stated by the Civil Code to acquire legal personality. This denial, however, contradicted an abundant administrative and judicial practice in Greece in relation to the Roman Catholic Church—neither the legal personality of the Catholic Church in Greece, and/or Catholic parish churches, nor their capacity to defend their rights in legal proceedings had ever been called in question. It also

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<sup>96</sup> See *Manoussakis*, § 45.

<sup>97</sup> *Id.*, § 48.

<sup>98</sup> *Canea Catholic Church v. Greece*, 16 December 1997.



contradicted the legal practice concerning the Greek Orthodox Church and the Jewish communities, which were granted legal personality and capacity to bring legal proceedings without observing the civil formalities common to all associations.

The ECtHR decided the case in the light of Article 6: right to a fair trial, which includes the right of access to a court. The Court noted that “[s]ettled case-law and administrative practice had, over the course of the years, created legal certainty, both in property matters and as regards the representation of the various Catholic parish churches in legal proceedings, and the applicant church could reasonably rely on that.”<sup>99</sup> In those circumstances, the mere failure of the church to comply with a simple formality could not be penalized with the deprivation of its legal personality and the subsequent incapacity to defend its own rights before the courts. It would not be proportionate to the legitimate aim, the protection of public order, alleged by the Greek government. “Such a limitation—the Court concluded—impairs the very substance of the applicant church’s ‘right to a court’ and therefore constitutes a breach of Article 6 § 1 of the Convention.”<sup>100</sup> For the rest, as a violation of Article 6 had been found, the Court declined to decide on the alleged violation of Article 9.

The doctrine of Canea Catholic Church has been reinforced by the recent decision of the Court in the Church of Bessarabia case,<sup>101</sup> which was explicitly founded on an interpretation of Article 9 in connection with Article 6 (and also with Article 11: freedom of association). The case related to the creation, in 1992, of a new autonomous local Orthodox church that claimed to be the successor, in the canonical order, of the old Metropolitan Church of Bessarabia, which existed until 1944. The new church counted approximately one million members among Moldavian people, with 160 ecclesiastics, 117 communities in Moldavian territory, and some communities in other Eastern European countries. At the time of the decision, it had been recognized by all the Orthodox patriarchates with the exception of the patriarchate of Moscow. The Moldavian government, however, upheld by the Supreme Court, had repeatedly refused to recognize the Church of Bessarabia, arguing that it was merely a schismatic group within the Metropolitan Church of Moldova, which had been instead recognized by the government in 1993; therefore, in the government’s view, the religious freedom of Orthodox citizens would not be

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<sup>99</sup> *Id.*, § 40.

<sup>100</sup> *Id.*, § 42.

<sup>101</sup> *Metropolitan Church of Bessarabia v. Moldova*, 13 December 2001.

violated, for they could practice their religion within the recognized church. Moreover, the government alleged that recognizing the legal status of the new church would alter the religious peace of the country, and therefore the protection of public order and public safety justified the refusal of recognition.<sup>102</sup>

The ECtHR did not hesitate in asserting that, within the Moldavian legal framework, refusal to grant legal personality constituted an interference with the applicant church's right to religious freedom. In effect, only the recognized religions could operate and be practiced by the citizens. Lack of recognition implied that the applicant church could not operate: neither its priests could conduct divine service, nor its members could meet to practice their religion without contravening the law, nor the church itself was entitled to judicial protection of its assets. "In addition—the Court affirmed—, one of the means of exercising the right to manifest one's religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets, so that Article 9 must be seen not only in the light of Article 11, but also in the light of Article 6."<sup>103</sup> On the other hand, the Court pointed out that the tolerance allegedly shown by the government could not be accepted as a substitute for legal recognition, for recognition alone was capable to confer legal rights to the church and its members.<sup>104</sup>

In that context, the ECtHR found that the price to pay for protecting theoretically the public order and the public safety was too high. In other words, "the Court consider[ed] that the refusal to recognise the applicant

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<sup>102</sup> The political implications of the case were well summarized by Gerhard Robbers in his paper to the previous meeting of the European-American Law and Religion Consortium (*Analyzing Types of Limitation: Public Order, Health, Morals*), held at Emory University, September 2002: "The Moldavian State, whose territory has repeatedly passed in earlier times from Romanian to Russian control and back, has an ethnically and linguistically varied population. That being so, the young Republic of Moldova, which had been independent since 1991, had few stabilizing structures it could depend on to ensure its continued existence, but one factor conducive to stability was religion, the majority of the population being Orthodox Christians. Consequently, recognition of the Moldavian Orthodox Church which was sub-ordinate to the Patriarchate of Moscow, had enabled the entire population to come together within that church. If the applicant church were to be recognized, that tie was likely to be loosed and the Orthodox population dispersed among a number of churches. Moreover, under cover of the applicant church, which was sub-ordinate to the Patriarchate of Bucharest, political forces acting hand-in-glove with Romanian interests favorable to reunification between Bessarabia and Romania were working. Recognition of the applicant church would therefore revive old Russian-Romanian rivalries within the population thus endangering social stability and even Moldova's territorial integrity."

<sup>103</sup> Metropolitan Church of Bessarabia, § 118.

<sup>104</sup> See *Id.*, § 129.

church ha[d] such consequences for the applicants' freedom of religion that it [could]not be regarded as proportionate to the legitimate aim pursued or, accordingly, as necessary in a democratic society."<sup>105</sup> The Court noted, additionally, that the government had failed to remain neutral and impartial towards the dissensions between different religious communities, for it made depend the legal recognition of the Church of Bessarabia on the will of a different ecclesiastical authority. The government, in effect, had affirmed that the Church of Bessarabia should settle its differences with the Church of Moldova, from which it wished to split, instead of requesting recognition as an autonomous church.<sup>106</sup>

#### *D. The Autonomy of Religious Groups*

It seems natural that article 9 ECHR should be construed to include the rights of religious groups to be recognized and to have internal autonomy and control of their own affairs. Problems arise, however, when the State provides a specific support or recognition to religious communities—which implies normally a certain degree of control of religious affairs—and those communities become divided.

The Church of Bessarabia case involved this type of problem, for the limitation on the applicant church's religious freedom was a consequence of the division between Orthodox Christianity in Moldova together with the fact that the Moldavian government supported one of the two churches in conflict. As indicated before, the ECtHR emphasized that Article 9 ECHR required the State to remain neutral and impartial in that sort of religious disputes. This aspect of the decision was grounded in two precedent cases, *Serif*, and *Hasan and Chaush*.

The *Serif* case<sup>107</sup> regarded the appointment of a religious Islamic leader (*Mufti*) in a region of Greece (Thrace) with a significant Muslim population of Turkish origin. The applicant had been elected Mufti of Rodopi by the Muslim community without the intervention of the State authorities prescribed by the Greek law governing the election and appointment of Muftis. It should be noted that the law had been changed a few days before the election took place and once it had been organized. The applicant was convicted under the Greek laws. The Greek government justified the intervention of the State in the

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<sup>105</sup> *Id.*, § 130.

<sup>106</sup> *See id.*, § 123.

<sup>107</sup> *Serif v. Greece*, 14 December 1999.

elections on account of the administrative and judicial functions that Muftis exercise, and argued that the criminal proceedings against the applicant were necessary for the protection of public order—given that there was another person claiming the leadership of the Muslim community, the courts had to convict the spurious one to keep the religious peace. In any event, the election and subsequent events sharpened the division within the Islamic community as well as the confrontation between civil and religious authorities.<sup>108</sup>

The ECtHR accepted that the protection of public order was a legitimate aim when social peace was at stake as a result of a strong religious division. However, the Court held that, unless there is a “pressing social need”, the State is not legitimated to interfere in a purely religious question decided by a religious community, even when that community is sharply divided over the issue. In particular, “the Court does not consider that, in democratic societies, the State needs to take measures to ensure that religious communities remain or are brought under a unified leadership”<sup>109</sup>. The possible ‘social tension’ derived from religious division is one of the unavoidable effects of pluralism, which is in turn inseparable from democracy. “The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.”<sup>110</sup> As in the case there was no evidence of a pressing social need that justified the government’s intervention, the Court found that Article 9 ECHR had been violated. The ECtHR has reiterated that doctrine in *Agga v. Greece*, a case almost identical to *Serif*.<sup>111</sup>

The *Hasan and Chaush* case<sup>112</sup> was also related to the religious disputes between two different factions of a Muslim community and the intervention of State authorities in the election and appointment of a Muslim religious leader, this time within the context of the process of democratization commenced in Bulgaria at the end of 1989. According to Bulgarian law, only the Muslim leadership registered by the Directorate of Religious Denominations enjoys the legal representation of the Islamic religious community and has the right to use

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<sup>108</sup> The case involved also interesting issues concerning some international treaties signed by Greece in the 1910s and 1920s, but the Court decided not to express any opinion on the subject.

<sup>109</sup> *Serif v. Greece*, § 52.

<sup>110</sup> *Id.*, § 53.

<sup>111</sup> *Agga v. Greece*, 17 October 2002. This case related also to the election of a Mufti in Thrace, this time in Xanthi. The facts were the same that in *Serif*: the local Islamic community had elected a religious leader and the government had appointed a different one, while the former was prosecuted in the Greek courts. The *dicta* of the ECtHR were almost a transcription of the *Serif* decision, continuously quoted in *Agga*.

<sup>112</sup> *Hasan and Chaush v. Bulgaria*, 26 October 2000.

its property and assets. The Bulgarian government, without providing any explicit ground for its decision, decided to support one of the rival religious leaders, after these proved over time to be unable to reach an agreement. The Council of Ministers even disobeyed an order of the Bulgarian Supreme Court urging it to register Mr. Hasan—the first applicant—as the Chief Mufti in Bulgaria.

The first, and very important, assessment of the European Court referred to the close connection between Articles 9 and 11 ECHR. In particular, a State intervention in the internal life or organization of a religious community does not concern exclusively the freedom of association but also the freedom of religion. In these cases, organizational autonomy of churches is protected both by Article 9 and 11. Protection of religious autonomy—the Court affirmed—is indispensable to preserve the pluralism inherent to a democratic society, and also to safeguard the individual's freedom of religion, which would otherwise become vulnerable, for many people live their religion, to a large extent, "in community with others."<sup>113</sup>

Then, following the doctrine expressed in *Serif*, the Court reiterated that national authorities interfere in the exercise of religious freedom when they fail to remain neutral with regard to changes in the leadership of a religious community, or when they try to force the community to come together under a single leadership against its own wishes.<sup>114</sup> In this case, the Court found that there had been a government's interference with the internal organization of the Islamic community, and that it could not be considered legitimate under Article 9(2), because national legislation gave a virtually unlimited power to

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<sup>113</sup> "The Court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention.

"Where the organisation of the religious community is at issue, Article 9 must be interpreted in the light of Article 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable." (*Hasan and Chaush*, § 62). The same doctrine was reiterated in *Church of Bessarabia*, § 118.

<sup>114</sup> See *Hasan and Chaush*, § 78.

public authorities to decide which religious leadership was the legitimate one and had consequently the right to be registered (and to administer the property of the religious community). More specifically, the Court's conclusion was that such interference was not "prescribed by law," as this expression had been interpreted in prior decisions (domestic law must be sufficiently precise, accessible and foreseeable, in order to constitute an adequate protection against arbitrary interferences by public authorities<sup>115</sup>). In the present case, the relevant Bulgarian legislation did not provide for any substantive criteria for the national authorities' decision, nor created procedural safeguards such as adversarial proceedings before an independent body, thus granting the government an unfettered power.<sup>116</sup>

Once the Court reached that conclusion, it deemed unnecessary to continue the three-prong test of article 9(2); i.e. to judge whether the State's interference pursued a "legitimate aim" and was "necessary in a democratic society." These aspects however, were considered by the Court in the follow-up of *Hasan and Chaush*: the case of Supreme Holy Council of the Muslim Community.<sup>117</sup> In the latter decision, the ECtHR reaffirmed its previous doctrine on the autonomy of religious groups: a State is not legitimated to restrict religious autonomy with the aim of guaranteeing the unified leadership of a religious community against the wishes of the same community.

A very different case of selective State support to diverse religious groups coming from the same stem was *Cha'are Shalom Ve Tsedek*, a complex case regarding the ritual slaughter of animals<sup>118</sup>. A strongly divided court—ten votes against seven—considered that national authorities enjoy a wide margin of appreciation to give different legal advantages to religious denominations, as far as it is not proved that individuals' freedom to practice their religion has been impaired. More precisely, it was held that neither the right to religious freedom nor the equality principle had been violated by the fact that French authorities granted authorization to issue administrative permits for ritual slaughter exclusively to the Jewish Consistorial Association of Paris, while denying such authorization to a minority Jewish association of ultra-orthodox orientation.

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<sup>115</sup> See *supra*, notes 27–32 and accompanying text.

<sup>116</sup> See *Hasan and Chaush*, §§ 84–88.

<sup>117</sup> *Supreme Holy Council of the Muslim Community v. Bulgaria*, 16 December 2004. This case referred to the same facts that were present in *Hasan and Chaush*, but this time in response to an application filed by the leader of the rival Islamic faction.

<sup>118</sup> *The Jewish Liturgical Association Cha'are Shalom Ve Tsedek v. France*, 27 June 2000.

The Consistorial Association is an institution representing most of the main denominations within Judaism. The applicant association, Cha'are Shalom Ve Tsedek, which is not part of the Consistory, deemed that the examination performed by the inspectors of the Consistorial Association was not meticulous enough to guarantee the religious purity of food.<sup>119</sup> In the Court's view, there had been no interference with the applicant's right to religious freedom, for members of the applicant association were not prevented from obtaining meat that satisfied their religious scruples; they could buy that sort of food in a few butcher's shops in Paris or import it from Belgium. Consequently, there was no need to examine whether the measures adopted by French authorities met the requirements of Article 9(2).

The Court held that the principle of equality had not been infringed either. French authorities had a margin of appreciation allowing them to determine that only a single institution representing all Jewish communities would be empowered to exempt ritual slaughterers from otherwise applicable laws governing slaughter of animals. That margin of appreciation was justifiable by reasons of public health (to ensure due hygienic conditions) and public order (to foster reciprocal toleration between different religious options).<sup>120</sup>

As indicated before, the Cha'are Shalom Ve Tsedek decision was strongly contested by seven judges, who considered that the restrictive interpretation of the equality principle provided by the Court in this case was unacceptable. In their view, the Court had failed to emphasize that the State is obliged to provide an analogous legal treatment as a means to guarantee pluralism, which

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<sup>119</sup> According to the French legislation and the European Union directives, ritual slaughter constitutes an exception to the general rules aimed at guaranteeing appropriate hygienic conditions and at avoiding unnecessary suffering to animals. This exception is granted in order to respect the ritual laws of some religions, especially Judaism and Islam. Only those persons who have been authorized by the religious bodies specifically approved by the French administration may perform ritual slaughter. In France, only the Joint Rabbinical Committee (*Commission Rabbinique Intercommunautaire*) has received the administrative approval necessary to grant permits regarding ritual slaughter according to the Torah and the Talmud. That committee is part of the Jewish Consistorial Association of Paris, an institution representing most Jewish communities in France and most of the main denominations within Judaism, with the exceptions of the liberals and the ultra-orthodox. The applicant Jewish liturgical association, which is of ultra-orthodox orientation, considered that the persons appointed by the Joint Rabbinical Committee were too lax in applying the ritual slaughter rules established by the Jewish law, and consequently the purity of food was not sufficiently certified. For that reason, the applicant association had asked—unsuccessfully—for a separate authorization to permit for its own slaughterers.

<sup>120</sup> Indeed the decision affirmed that the applicant association had the opportunity to reach an agreement with the Consistorial Association of Paris in order to have ritual slaughter performed by its own personnel. The negotiations had failed because of some differences concerning the religious tax that should be required from buyers of the certified food and paid to the Consistorial Association.

is an indispensable condition to the exercise of freedom. The seven judges affirmed, in a joint dissenting opinion, that the Court had omitted to analyze whether the applicant association was in a situation analogous to the Jewish Consistorial Association of Paris, as far as the legislation on religious bodies was concerned—i.e. whether it was a body of religious nature, and whether it pursued religious aims and utilized equivalent means. If that was the case, as it seemed to be, the right approach would have been to examine whether the French administration had an “objective and reasonable justification” to grant the requested administrative permit for ritual slaughter to one Jewish association and to deny the same permit to the other. Apparently that justification did not exist, and consequently—the dissenting opinion concluded—the association *Cha’are Shalom Ve Tsedek* had been a victim of discrimination.<sup>121</sup>

#### *E. The Religious Freedom of Individuals Within a Religious Community*

In recent years, the ECtHR has explicitly recognized a long accepted doctrine proposed by the Commission: that a church or religious body can exercise, on behalf of its adherents, the rights guaranteed by Article 9 ECHR.<sup>122</sup> This must not be understood, however, as requiring a religious group to function according to a democratic internal structure, as if churches

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<sup>121</sup> In addition, the dissenting opinion argued that the French State could not take into account either the different number of followers, nor the doctrinal discrepancies in the religious requisites of ‘pure’ food, nor the inability of both associations to reach an agreement. On the contrary, the State was obliged to provide an analogous legal treatment as a means to guarantee pluralism, which is an indispensable condition to the exercise of freedom. Moreover, in the dissenting judges’ view, the European Court did not attach enough importance to two facts: first, administrative French praxis had been very different with regard to the Muslims, with respect to whom there was a remarkable diversity of representative bodies approved by the French administration to grant permits for ritual slaughter; and second, it was inaccurate to invoke reasons of public health in this case, because the hygienic conditions required by the applicant association were stricter than the ones usually existing in the slaughterhouses of the Consistorial Association.

<sup>122</sup> See *Cha’are Shalom Ve Tsedek*, § 72; *Church of Bessarabia*, § 101. The Commission, initially, had rejected that churches could, as such, exercise the right to religious freedom and, consequently, be considered applicants before the Strasbourg jurisdiction; an application could be accepted only when it was filed by individuals, who would act, in some way, on behalf of their church (see Dec. Adm. on App. No. 3798/68, *Church X. v. United Kingdom*, 2 Yearbook of the European Convention 306, 314; Dec. Adm. on App. No. 4733/71, *X. v. Sweden*, 14 Yearbook of the European Convention 664, 674). In 1979, however, with regard to an application filed by the Church of Scientology, the Commission explicitly overruled its precedent doctrine, pointing out that it was artificial to distinguish between the religious freedom of a church and that of its members—when a religious community files an application, it acts in reality on behalf of its followers, and consequently it possesses full capacity to claim that its freedom of religion has been violated (see Dec. Adm. on App. No. 7805/77, *X. & Church of Scientology v. Sweden*, 16 Eur. Comm’n H.R. Dec. & Rep. 68, 70; that doctrine was reiterated in Dec. Adm. on App. No. 8118/77, *Omkananda & Divine Light Zentrum v. Switzerland*, 25 Eur. Comm’n H.R. Dec. & Rep. 105, 117).



had to act strictly representing the posture of the majority of their members. In this regard, the above mentioned cases *Serif*, *Agga*, *Hasan and Chaush*, *Church of Bessarabia* and *Holy Council of the Muslim Community* are very expressive of the idea that a religious community is entitled to a complete guarantee of its internal autonomy as far as no person is forced to join or to remain in that community.

In accordance with those decisions of the ECtHR, the previous case law of the Commission was very clear in asserting that, in the inside of religious communities, the freedom of the community itself prevails over the freedom of individuals. In the Commission's view, Article 9 ECHR does not protect the exercise of religious freedom within a church or, in other words, the individual's freedom to sustain a heterodox position within his church. On the contrary, churches have the right to impose limitations on their members' exercise of religious freedom. They can enforce a uniform religious doctrine and, consequently, inflict proportionate penalties on deviating members and even expel them from the religious community. The Commission has consistently held that the individual's freedom of religion is sufficiently guaranteed by the fact that he is free to abandon his religious community at any time.<sup>123</sup> Therefore, in cases of conflict between the church and some of its members, Article 9 ECHR do not protect an alleged right of the latter to challenge an ecclesiastical decision before the civil courts, for ecclesiastical authorities alone are competent to resolve their internal disputes.

Thus, the Commission has declared inadmissible the applications of a minister of the Danish Church who refused to comply with the church's directions on the way of administering baptism;<sup>124</sup> a pastor of the Evangelical Church of Westphalia who had been subjected to compulsory retirement for refusing to administer baptism to minors;<sup>125</sup> a clergyman of the Swedish

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<sup>123</sup> At the same time, the Commission has affirmed that the State has a margin of appreciation to define the formal requirements that people must comply with when declaring that they abandon their churches, especially when membership to a church produces some civil effects. Thus, the Commission supported the position of Swiss authorities when they considered that two Catholic citizens had not manifested clearly and unequivocally their abandonment of Catholicism neither by the fact that they did not declare their membership to any particular religion when they registered in the municipal census, nor by leaving blank the section of the income tax form in which they had to indicate their religion. In that case, the civil effects consisted in the obligation to pay a local tax for the maintenance of churches, imposed on the members of legally recognized churches. Cf. Dec. Adm. on App. No. 10616/83, *Gottesmann v. Switzerland*, 40 Eur. Comm'n H.R. Dec. & Rep. 284.

<sup>124</sup> See Dec. Adm. on App. No. 7374/76, *X. v. Denmark*, 5 Eur. Comm'n H.R. Dec. & Rep. 157.

<sup>125</sup> See Dec. Adm. on App. No. 10901/84, *Prussner v. Germany* (unpublished).

Church whom the diocesan chapter had considered not qualified for a position of vicar as a result of his negative conception of women's ministry.<sup>126</sup>

It is worth noting that the Commission seems to have extended the protection of churches' integrity to those denominational entities that, though not being part of the organic structure of a church, are inspired by the same dogmatic and moral principles. As a consequence, denominational entities are entitled to dismiss those employees who overtly maintain ideas contrary to the official doctrine in question. Thus, the Commission declared inadmissible the application of a physician who, working for a Catholic hospital, had been discharged for having expressed publicly—in the press and on television—opinions favorable to abortion.<sup>127</sup>

#### *F. The Public Manifestation of Religious Ideas in the Educational Environment*

The Strasbourg jurisdiction has dealt with several cases in which the point at issue was the public expression of religious ideas, by teachers or by students, within the educational environment. In all of them the Commission or the Court supported the limitations on manifestation of religion imposed by national authorities.

The oldest case refers to the application filed by the teacher of a non-denominational public school, in the United Kingdom, who taught English Language and Mathematics.<sup>128</sup> He had received numerous admonitions from the school director to stop providing religious instruction to the students in his class time, organizing 'Evangelical clubs' in the school premises, and showing ostensibly—on his clothes and on his briefcase—stickers with slogans opposing to abortion. As he ignored such warnings, the competent authorities of the county discharged him. The Commission declared his application inadmissible under Article 10, holding that the limitations imposed on the free expression of his religious ideas was justified as necessary for the protection of the rights and freedoms of others, in particular the right of the students' parents

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<sup>126</sup> See Dec. Adm. on App. No. 12356/86, *Karlsson v. Sweden*, 57 Eur. Comm'n H.R. Dec. & Rep. 172. We could also mention the application of a vicar of the Norwegian Church whom the government had suspended from his post of vicar (although he was permitted to continue with his strictly religious duties) for refusing to comply with the civil functions attached to his pastoral office; in particular, he refused to perform and register marriage ceremonies in protest against the 1978 liberalization of abortion in Norway (see Dec. Adm. on App. No. 11045/84, *Knudsen v. Norway*, 42 Eur. Comm'n H.R. Dec. & Rep. 247).

<sup>127</sup> See Dec. Adm. on App. No. 12242/86, *Rommelfanger v. Germany* (unpublished).

<sup>128</sup> Dec. Adm. on App. No. 8010/77, *X. v. United Kingdom*, 16 Eur. Comm'n H.R. Dec. & Rep. 101.

to have their children educated according to their own religious and philosophical convictions.

A much more recent case declared inadmissible by the ECtHR, *Dahlab*,<sup>129</sup> also involved the public manifestation of religion by a teacher who, this time, wore clothes that were an unequivocal sign of her religious affiliation, without attempting to disseminate her ideas in the school. The applicant was a Swiss teacher in a public primary school who had converted from Catholicism to Islam. The school authorities, in application of a cantonal law aimed at preserving the secular character of public schools, prohibited her from wearing the traditional prescriptive headscarf when teaching to her students. The Court recognized that imposing on teachers the prohibition of carrying 'powerful' religious symbols constituted an interference with the applicant's religious freedom and, consequently, affirmed that the State had to provide a sound justification under Article 9(2) ECHR.

The European Court held that Swiss authorities had applied reasonably their margin of appreciation when considered that the prohibition from wearing the headscarf was a measure necessary for the protection of public order, public safety, and the rights and freedom of others. The ECtHR shared the opinion of the Swiss government, upheld by the Federal Court, on the consequences of the principle of neutrality (*laïcité*). This principle was an instrument to preserve the 'religious peace' in the community,<sup>130</sup> especially in the context of a school whose students came from very diverse cultural traditions. In consequence, neutrality entailed some restrictions on the civil servants' right to manifest their religion or belief, above all in the educational environment, where students may be more easily influenced and 'religious peace' must be protected with extreme care (the Court paid a specific attention to the low age of the applicant's students).<sup>131</sup> It is worth emphasizing that the Swiss courts sustained the limitation on the applicant's religious freedom because the religious symbol in question was 'powerful', i.e. too ostensible (*fort*, in the original French version of the decision). The solution would have been different—the Swiss courts noted—in the case of 'discreet' religious

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<sup>129</sup> Dec. Adm. on App. No. 42393/98, *Dahlab v. Switzerland*, 15 February 2001. When Protocol n. 11 came into force, in November 1998, the European Commission was suppressed, and the declarations of inadmissibility of applications are the competence of the Court.

<sup>130</sup> Note the analogy with the position of the Greek, Bulgarian, and Moldavian governments in the cases *Serif*, *Hasan and Chaush*, *Church of Bessarabia* and *Holy Council of the Muslim Community* (*see supra*, notes 101–117 and accompanying text).

<sup>131</sup> *See Dahlab*, "The law", § 1.

symbols, such as a small jewel; if placing a Christian crucifix in a public school was banned, the same logic required that teachers were prohibited from wearing 'powerful' religious symbols as headscarves, soutanes or *kippas*.<sup>132</sup>

One might wonder whether the Court showed too much respect for the State's margin of appreciation in the Dahlab case. First, the 'religious peace' of the school does not seem to have suffered any serious threat, for the applicant wore the Islamic *foulard* during approximately five years until she was prohibited from doing so by the (female) general director of primary schools of Geneva's canton; in all those years there not appears to have been any problem caused at the school by the applicant's veil nor a single complaint on the part of the students or their parents.<sup>133</sup> Second, it is arguable that the principle of *laïcité* or neutrality should require, in a country enjoying actual religious peace as Switzerland, that no religious personal symbols are visible in the teachers' clothes, instead of permitting that students can see in their own school an evidence of the religious pluralism existing in Swiss society. As long as teachers respect the students' belief and do not attempt to proselytize them, the evidence of religious pluralism could be more consistent with a neutral attitude of the State, and more educative for the students, than a fictional absence of religion on the part of the school personnel. It would have been perhaps more comprehensible that the Swiss courts, and the ECtHR, declared unacceptable certain expressions of religious belief in a public place not merely because they were religious, but because they transmitted a message not easily compatible with the Western concept of democracy and human rights—as may have been the case in *Dahlab*, with regard to the unequal position of women in Islam, in comparison with men.

There are three other cases concerning the public wearing of head scarves by Muslim women in an educational environment, this time by University students. Two of them, Karaduman and Bulut,<sup>134</sup> referred to very similar facts and were declared inadmissible by the Commission with an almost identical reasoning. Two female graduates of the University of Ankara had been denied a certificate of studies because they failed to present an identity photo in accordance with the clothing rules of the University, which required students to wear nothing on their heads and to have their hair well arranged. These rules were arguably designed to reduce the visibility of Islam in a country, as

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<sup>132</sup> See Dahlab, "The facts", A, *in fine*.

<sup>133</sup> See Dahlab, "The facts", A.

<sup>134</sup> See, respectively, Dec. Adm. on App. No. 16278/90, and Dec. Adm. on App. No. 18783/91. Both decisions were adopted by the Commission in the same date, 3 May 1993.

Turkey, that has a majority of Islamic population and is founded on the constitutional principle of secularism. Indeed the Constitutional Court of Turkey, in 1989, declared unconstitutional, as contrary to the constitutional principle of secularism, a statute authorizing women to wear headscarves in University centers. The students argued that wearing her veil was part of the rites and practices of their religion.

The Commission accepted in substance the arguments of the Turkish government: in the particular legal and social circumstances of the country, permitting Muslim female students to wear a head scarf in the University could create a social conflict and put some pressure on students with a different belief. Public order, therefore, could justify the government's position. Curiously enough, however, the Commission did not declare the applications inadmissible under Article 9(2) ECHR but under Article 9(1). With a reasoning rather formalistic, it held that here had been no interference with the applicants' religious freedom, for the studies certificate and the picture were aimed at attesting the identity and professional capacities of the applicants, and could not be used, in a system of secular University, to manifest their religious beliefs.

Some years later, a similar case, *Leyla Şahin*,<sup>135</sup> was examined on the merits and decided by the European Court. The applicant was a female university student at the Faculty of Medicine of Istanbul University. After having been refused entrance to some lectures and examinations for wearing an Islamic headscarf in class, in violation of the University rules, she was suspended from the university for a semester. The ECtHR followed, substantially, the reasoning of the European Commission in *Karaduman* and *Bulut* with regard to the justification of the restrictive measure taken by the Turkish authorities. The Court, however, more consistently than the Commission, accepted that there had been an interference with the applicant's right to religious freedom and, under Article 9(2) ECHR, with an explicit reference to the State's margin of appreciation, declared that the interference could be considered "necessary in a democratic society."<sup>136</sup>

Religious clothing has not been the only source of conflicts between secular authorities and Muslim citizens within the educational environment. A decision of inadmissibility adopted by the Commission in 1981 addressed the issue of the incompatibility between the Friday prayer and the teaching duties

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<sup>135</sup> *Leyla Şahin v. Turkey*, 29 June 2004.

<sup>136</sup> *See id.*, § 114.

of a practicing Muslim.<sup>137</sup> The applicant was a British citizen of Islamic religion, who had been employed as a full-time teacher by the ILEA (Inner London Education Authority) in 1968. In the subsequent years, he was destined to different schools. Until 1974 there was no problem, for all the schools in which he worked were far from a mosque and excessive distance was a sound reason that exempted him from taking part in the Friday collective prayer. In 1974, however, he was relocated at a center that was close enough to a mosque as to allow him to join the Friday afternoon prayer. Therefore, he began to leave the school every Friday after the morning classes, returning with a forty-five minute delay in the afternoon. His request for formal permission was rejected by the ILEA. To avoid being discharged, he was bound to accept a part-time contract (four-and-a-half days instead of five days), with the consequent reduction of salary and difficulties for his personal promotion. The applicant claimed that he had been the victim of discrimination on the ground of religion. The Commission held that there was no interference with the applicant's religious freedom, for the ILEA had given the due consideration to his religious belief when it offered a different contract that permitted him to keep his job and his religious practice at the same time; the Commission emphasized also that the incompatibility between his professional and religious obligations neither was communicated by the employee at the time of signing the contract nor arose during the first years of his job.

#### *G. Governmental Control of 'Sects'*

The ECtHR had judged two cases with respect to governmental actions aimed at restricting the activity of atypical religious groups or the so-called 'sects'. In none of them the Court expressed any opinion under Article 9 ECHR, but it is worth mentioning them here—briefly—because both ended up with a solution favorable to the applicants, and because this topic has been the object of a continued attention by the Parliamentary Assembly of the Council of Europe since the 1990s.<sup>138</sup>

The Tsavachidis case, in 1999,<sup>139</sup> related to the application of some followers of the Jehovah's Witnesses who had been subjected to secret surveillance by the National Intelligence Service exclusively by reason of their

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<sup>137</sup> Dec. Adm. on App. No. 8160/78, X. v. United Kingdom, 22 Eur. Comm'n H.R. Dec. & Rep. 27.

<sup>138</sup> That attention has materialized in two main documents: Recommendation 1178 (1992) on sects and new religious movements, and Recommendation 1412 (1999) on illegal activities of sects.

<sup>139</sup> Tsavachidis v. Greece, 21 January 1999.

membership to that religious group. The situation had been addressed by the Greek mass media. The case ended in a friendly settlement in which the Greek government agreed to pay a sum of money for the costs and submitted a formal statement declaring that “the Jehovah’s Witnesses are not, and will not in the future be, subject to any surveillance on account of their religious beliefs.”<sup>140</sup> By then the European Commission had already elaborated its report on the merits of the case, and expressed the opinion that there had been a violation of Article 8 ECHR (13 votes to 4) and there had been no violation of Article 9 ECHR (9 votes to 8). No other application of the kind has been addressed to the ECtHR, but it may be easily inferred that the Court’s position could be summarized in the idea that members of minority religious groups may not be kept under surveillance in the absence of a compelling justification other than their mere religious affiliation.

An analogous rule should be applied to the confinement of people in order to subject them to a process of ‘deprogramming’ from their membership in a group characterized as a ‘sect’: in the absence of an objective and forceful reason, this is something that can not be done against their will. This was the issue in the Riera Blume case,<sup>141</sup> raised by some members of the so-called ‘Esoteric Research Center’ (*Centro Esotérico de Investigaciones*). All of them were of legal age. The applicants’ homes had been searched following a judicial order, and the applicants were subsequently confined in a nearby hotel against their will for ‘deprogramming’. Although the confinement did not follow any judicial order but was carried out by a private ‘anti-sect’ association, there had been a certain collaboration of the Catalan police. The Court decided in favor of the applicants in the light of Article 5(1) ECHR (right to liberty and security) and avoided pronouncing any opinion under Article 9.

#### *H. Limitations Imposed on Freedom of Expression on Account of Religion*

##### *1. Laws on Blasphemy*

In the mid 1990s, the ECtHR decided two significant cases in which the protection of the religious feelings of citizens prevailed over some manifestations of the freedom of expression that were considered gratuitously offensive against Christian doctrine. The two cases, *Otto-Preminger-Institut*

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<sup>140</sup> *Id.*, § 21.

<sup>141</sup> *Riera Blume and others v. Spain*, 14 October 1999.

(1994)<sup>142</sup> and Wingrove (1996),<sup>143</sup> involved a conflict between some audiovisual works and the national laws on blasphemy.

The facts in both cases offer numerous similarities. In *Otto-Preminger-Institut*, the work in question was a satiric film entitled 'Council in Heaven' (*Das Liebeskonzil*),<sup>144</sup> based upon a 19th century play, in which God was presented as a senile impotent man prostrated before the devil and Jesus Christ as a mentally retarded person; an erotic relationship between the devil and the Virgin—depicted as a wanton lady—was also insinuated. The film was to be showed in the cinema of the applicant association, in Innsbruck, which was accessible to members of the public after paying a fee; persons under seventeen years were not to be admitted. Nevertheless, after a wide advertising of the film, and following a request of the local authorities of the Catholic Church, the public prosecutor instituted criminal proceedings against the manager of the association. Although these criminal proceedings were discontinued, the Austrian courts ordered first the seizure and later the forfeiture of the film, in application of the Austrian law, which punishes the act of disparaging or insulting religious persons, objects of veneration or doctrines.<sup>145</sup>

In *Wingrove*, the applicant was the author of a video work of eighteen minutes' duration containing a peculiar interpretation of St Teresa of Avila's ecstatic visions, in a pornographic setting with homosexual connotations. With an ideological background, if any, clearly weaker than the film in *Otto-Preminger-Institut*, the video did not contain any dialogue, only music (rock) and moving images, which the author himself had described as pornographic in a magazine interview. The author submitted the video to the British Board of Film Classification, which refused to grant the requested classification certificate, with the effect that the video could not be commercially distributed under British law. The reason provided by the Board was that the video

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<sup>142</sup> *Otto-Preminger-Institut v. Austria*, 20 September 1994.

<sup>143</sup> *Wingrove v. United Kingdom*, 25 November 1996.

<sup>144</sup> The German title *Das Liebeskonzil* means literally 'The Council of Love', but in the English version of the ECtHR decision is translated as 'Council in Heaven'; in the French text of the decision, more accurately, it is translated as 'Le Concile d'amour' (cf. *Otto-Preminger-Institut*, § 10).

<sup>145</sup> Section 118 of the Penal Code reads as follows: "Whoever, in circumstances where his behavior is likely to arouse justified indignation, disparages or insults a person who, or an object which, is an object of veneration of a church or religious community established within the country, or a dogma, a lawful custom or a lawful institution of such a church or religious community, shall be liable to a prison sentence of up to six months or a fine of up to 360 daily rates." The Media Act, in turn, provides that forfeiture can be ordered in addition to any normal sanction under the Penal Code and even when criminal proceedings against a particular person are not possible (See *Otto-Preminger-Institut v. Austria*, §§ 25-28).



violated the existing law of blasphemy. The appellate body responsible for video distribution permits upheld its position. In England, blasphemy is a common law offence that includes language which is contemptuous or ludicrous with regard to Christianity or to the Church of England.<sup>146</sup>

Another similarity between the two cases refers to the applicability of the laws on blasphemy. Both Austria and United Kingdom are countries with an ancient and consistent Christian tradition, with the consequence that their respective laws of blasphemy are applicable, in practice, to offences against Christianity but not against other religions. Certainly, it would be surprising to see the Austrian law applied to punish an offence against a non-Christian religion; English courts have even recognized that inequality explicitly.<sup>147</sup> However, the ECtHR, though admitting that fact as an “anomaly . . . in a multi-denominational society,” declined “to rule in abstracto as to the compatibility of domestic law with the Convention.”<sup>148</sup>

Finally, the approach of the Court was also very similar in those two cases. The existence of an interference with the applicants’ right to freedom of expression did not raise any doubt. And those interferences were analyzed from the same conceptual perspective. The general principles stated by the Court were, briefly, as follows.

Freedom of expression—the Court affirmed—“is applicable not only to ‘information’ or ‘ideas’ that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”<sup>149</sup> Nevertheless, the freedom guaranteed by Article 10 ECHR is not unlimited. Religious beliefs of others are among those limits, and national

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<sup>146</sup> The ECtHR stated, quoting the case of *Whitehouse v. Gay News Ltd and Lemon* [1979], in *Appeal Cases*, 617 at 665, that the law of blasphemy in England was correctly formulated as follows: “Every publication is said to be blasphemous which contains any contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ or the Bible, or the formularies of the Church of England as by law established. It is not blasphemous to speak or publish opinions hostile to the Christian religion, or to deny the existence of God, if the publication is couched in decent and temperate language. The test to be applied is as to the manner in which the doctrines are advocated and not to the substance of the doctrines themselves.” (*See Wingrove*, § 27).

<sup>147</sup> *See Wingrove*, §§ 28-29. In reality, in the United Kingdom as well as in Austria, these laws are rarely applied. The Court indicated that in the United Kingdom only two prosecutions concerning blasphemy have been brought in the last seventy years. *See Id.*, § 57.

<sup>148</sup> *Id.*, § 50.

<sup>149</sup> *Otto-Preminger-Institut*, § 49, with explicit reference to *Handyside*, § 49.

laws may consider the necessity of preventing or punishing gratuitous attacks to those beliefs.<sup>150</sup> This does not mean, of course, that members of a religion can expect to be free from criticism or hostility, but the State is responsible for ensuring that the rights guaranteed by Article 9 ECHR can be peacefully exercised and that the spirit of tolerance, which is characteristic of a democratic society, is not maliciously violated.<sup>151</sup>

In other words, the Court held that the protection of the religious freedom of others was a legitimate aim that, under Article 10(2) ECHR, justified a limitation on the freedom of expression, provided that the limitative measure could be deemed “necessary in a democratic society.”<sup>152</sup>

Thus, the notion of necessity proved to be, once again, the nub of the question. To analyze it, the Court had to assess the actual social impact of the anti-religious form of expression and, consequently, to determine whether the remedies provided by criminal law were proportionate to the legitimate aim

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<sup>150</sup> “[A]s is borne out by the wording itself of Article 10 para. 2, whoever exercises the rights and freedoms enshrined in the first paragraph of that Article (art. 10-1) undertakes ‘duties and responsibilities’. Amongst them—in the context of religious opinions and beliefs—may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration.” (Otto-Preminger-Institut, § 49. In similar terms, *see* Wingrove, § 52).

<sup>151</sup> “Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 . . . to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them. . . . The respect for the religious feelings of believers as guaranteed in Article 9 . . . can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.” (Otto-Preminger-Institut, § 47).

<sup>152</sup> Three dissenting judges in Otto-Preminger-Institut pointed out that “[t]he Convention does not, in terms, guarantee a right to protection of religious feelings.” (joint dissenting opinion of Judges Palm, Pekkanen and Makarczyk, § 6; *see also*, in this regard, Evans, *supra*, note 3, 335–36). However, some manifestations of freedom of expression, by reason not so much of its substance but of its manner, may amount to a sort of harassment of people who exercise their freedom of religion or belief in certain direction. On the other hand, manifestations of freedom of expression like the ones that were at issue in Wingrove and Otto-Preminger-Institut certainly do not contribute to create the atmosphere of tolerance and respect that facilitates the actual exercise of freedoms.

pursued. In those two points, the ECtHR decided to recognize a wide margin of appreciation to the Austrian and British national authorities.

First, the Court affirmed that, as in the case of morals, it was “not possible to discern throughout Europe a uniform conception of the significance of religion in society,” and, therefore, it was impossible “to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others.”<sup>153</sup> In consequence, a wider margin of appreciation had to be left to the national authorities, which had a closer contact with that aspect of their societies, subject to such rapid changes.<sup>154</sup> In both cases, the Court could find nothing disproportionate in the restrictive measures adopted by the Austrian and British authorities within their respective legal frameworks.<sup>155</sup>

Second, for analogous reasons, the ECtHR declared that an equally wide margin of appreciation had to be recognized with respect to the maintenance and application of the national laws that considered blasphemy a criminal offence.<sup>156</sup> The Wingrove decision, in particular, emphasized the increasing tendency, in many European countries, to abolish or to put those laws into question, as reflected in the fact that they are very rarely applied. It also suggested the Court’s lack of confidence in the actual usefulness of criminal remedies to solve that type of conflicts. However, in the absence of a common

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<sup>153</sup> *Otto-Preminger-Institut*, § 50.

<sup>154</sup> “[A] wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. Moreover, as in the field of morals, and perhaps to an even greater degree, there is no uniform European conception of the requirements of ‘the protection of the rights of others’ in relation to attacks on their religious convictions. . . . By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the ‘necessity’ of a ‘restriction’ intended to protect from such material those whose deepest feelings and convictions would be seriously offended.” (*Wingrove*, § 58. Compare with the ECtHR’s doctrine in *Handyside*, quoted *supra*, note 52).

<sup>155</sup> In particular, the Court rejected the applicants’ arguments aimed at demonstrating that their respective audiovisual works would have had a limited distribution, among people of legal age who were supposed to be specifically interested in watching them. The Court accepted the governments’ submissions with regard to the actual or potential public impact of the works in question. In *Otto-Preminger-Institut*, because the film had been widely advertised in an area, as Tyrol, with a large majority of Catholic population, with the effect of provoking a violent public discussion in the region (*see* § 54). In *Wingrove*, because a video, once it is in the market, may easily escape from the authorities’ control by being copied, lent, rented, sold or viewed in different homes (*see* § 63).

<sup>156</sup> *See Otto-Preminger-Institut*, § 49.

consensus of European countries, the Court was not prepared to declare that laws on blasphemy were as such incompatible with the Convention.<sup>157</sup>

## 2. *Prohibition of Religious Advertising*

More recently, the ECtHR has decided another case related to a conflict between freedom of expression and the protection of religious sentiments: *Murphy v. Ireland*.<sup>158</sup> In this case, however, the point at issue was not blasphemy, but the legal prohibition of religious advertising in commercial radio and television.

The facts were, summarily, as follows. The applicant, a pastor of a Christian minority church—the Irish Faith Centre—had submitted an advertisement to an independent and commercial radio station.<sup>159</sup> Although the radio station was prepared to broadcast the advertisement, the relevant administrative body of control (Independent Radio and Television Commission) stopped the broadcast, considering that it was contrary to the Irish legislation on the matter: in particular, to the Radio and Television Act 1988, whose section 10(3) provided that “[n]o advertisement shall be broadcast which is directed towards any religious or political end or which has any relation to an industrial dispute.”<sup>160</sup> The courts sustained the administrative prohibition, taking into account especially two factors: religion has been historically a divisive factor in Ireland, and therefore a restriction of freedom of expression consisting in a prohibition of religious advertising was justified to keep social peace; in addition, the interference with the applicant’s freedom

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<sup>157</sup> “[B]lasphe my legislation is still in force in various European countries. It is true that the application of these laws has become increasingly rare and that several States have recently repealed them altogether. In the United Kingdom only two prosecutions concerning blasphemy have been brought in the last seventy years . . . . Strong arguments have been advanced in favor of the abolition of blasphemy laws, for example, that such laws may discriminate against different faiths or denominations . . . or that legal mechanisms are inadequate to deal with matters of faith or individual belief . . . . However, the fact remains that there is as yet not sufficient common ground in the legal and social orders of the Member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention.” (Wingrove, § 57).

<sup>158</sup> *Murphy v. Ireland*, 10 July 2003.

<sup>159</sup> The text of the advertisement read as follows: “What think ye of Christ? Would you, like Peter, only say that he is the son of the living God? Have you ever exposed yourself to the historical facts about Christ? The Irish Faith Centre are presenting for Easter week an hour long video by Dr Jean Scott Phd on the evidence of the resurrection from Monday 10<sup>th</sup> - Saturday 15<sup>th</sup> April every night at 8.30 and Easter Sunday at 11.30am and also live by satellite at 7.30pm.” (*Murphy*, § 8).

<sup>160</sup> *Id.*, § 26.

was minimal—it referred exclusively to paid religious advertisements on radio or television.<sup>161</sup>

The European Court understood that the case related to the means of expression rather than to the manifestation of religion, and accordingly examined it under article 10 ECHR, which “protects not only the content and substance of information but also the means of dissemination.”<sup>162</sup> The Court decided in favor of the respondent government, applying the general principles established in *Wingrove* and *Otto-Preminger-Institut*.

As in these two cases, the crucial question was the necessity of the State’s interference with the applicant’s freedom of expression, which required to judge whether the restrictive measure was proportionate to the legitimate aim pursued. In sustaining the position of the Irish government, the ECtHR took into account especially three factual elements. First, the interference with the applicant’s rights was circumscribed to the sphere of paid religious advertising in audiovisual media, being his freedom of religious expression otherwise not restricted.<sup>163</sup> Second, the power of the media at issue (radio and television) was much greater than other media of communication.<sup>164</sup> Third, there were obvious and significant difficulties to establish a partial prohibition of religious advertising that implied some sort of control of permissible advertisements by

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<sup>161</sup> As the Supreme Court of Ireland put it, “the restriction was ‘minimalist’, the applicant had the right to advance his views in speech or writing or by holding assemblies or associating with persons of like mind as himself; he had no lesser right than any other citizen to appear on radio or television; and the only restriction placed upon his activities was that he could not advance his views by a paid advertisement on radio or television.” (*Id.*, § 16).

<sup>162</sup> *Id.*, § 61.

<sup>163</sup> “[T]he prohibition related only to advertising. This Court considers that this limitation reflects a reasonable distinction made by the State between, on the one hand, purchasing broadcasting time to advertise and, on the other, coverage of religious matters through programming (including documentaries, debates, films, discussions and live coverage of religious events and occasions). Programming is not broadcast because a party has purchased airtime and, as outlined by the Government, must be impartial, neutral and balanced, the objective value of which obligation the parties did not dispute. The applicant retained the same right as any other citizen to participate in programs on religious matters and to have services of his church broadcast in the audio-visual media. Advertising, however, tends to have a distinctly partial objective: it cannot be, and is not, therefore subject to the above-outlined principle of impartiality and the fact that advertising time is purchased would lean in favor of unbalanced usage by religious groups with larger resources and advertising. Consequently, other than advertisements in the broadcast media, the applicant’s religious expression was not otherwise restricted.” (*Id.*, § 74).

<sup>164</sup> “[I]t is recalled that the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference. The Court has acknowledged that account must be taken of the fact that the audio-visual media have a more immediate and powerful effect than the print media.” (*Id.*, § 69; the Court made a reference to its precedent doctrine in *Jersild v. Denmark*, 23 September 1994, § 31).

governmental agencies according to objective criteria; such a filtering process could lead to discriminatory distinctions between religions.<sup>165</sup>

As a consequence, the ECtHR held that the Irish government had not gone beyond its margin of appreciation in these matters. Moreover, the Court mentioned two other circumstances present in this case that contributed to enlarge the already wide margin of appreciation of the State. On the one hand, the divisive role traditionally played by religion in Irish society, which recommended a particular government's prudence in this context; it was not unreasonable that the government endeavored to avoid a wide and uncontrolled dissemination of religious messages that could be interpreted as offensive by the population, thus creating an unnecessary social tension.<sup>166</sup> On the other hand, the fact that there is no uniform policy in European countries with regard to religious advertising—on the contrary, there are clearly diverging tendencies.<sup>167</sup>

The latter circumstance, although mentioned at the very end of the decision and almost as an *obiter dictum*, seems to have been essential for the final

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<sup>165</sup> As the Court affirmed: "There is, in this context, some force in the Government's argument that the exclusion of all religious groupings from broadcasting advertisements generates less discomfort than any filtering of the amount and content of such expression by such groupings." (Murphy, § 77). It is worth noting that there was an unsuccessful attempt, in 1999, to amend the 1988 Act. During the parliamentary debate on the bill, which would confer to the Independent Radio and Television Commission competence to select which religious advertising were or were not bona fide, the relevant minister of the Irish government remarked the difficulties to perform a selection of the legitimate religious advertising upon that criterion. The minister affirmed: "It would be extremely difficult to regulate religious advertising in the same way as advertising for goods and services is regulated . . . if we are to consider relaxing the existing total ban on broadcast advertising directed towards a religious end, we must inevitably consider the removal of the prohibition of the ban in its entirety rather than the introduction of a more selective prohibition." (quoted in Murphy, § 28). In any event, section 10(3) of the 1988 Act was shortly afterwards diluted by the Broadcasting Act 2001—designed to facilitate the introduction of digital terrestrial broadcasting in Ireland—whose section 65 provided: "Nothing in section 20(4) of the Act of 1960 or section 10(3) of the Act of 1988 (including either of those sections as applied by this Act) shall be construed as preventing the broadcasting of a notice of the fact - (a) that a particular religious newspaper, magazine or periodical is available for sale or supply, or (b) that any event or ceremony associated with any particular religion will take place, if the contents of the notice do not address the issue of the merits or otherwise of adhering to any religious faith or belief or of becoming a member of any religion or religious organization." (quoted in Murphy, § 30).

<sup>166</sup> See *Id.*, §§ 71-73.

<sup>167</sup> "[T]he Court observes that there appears to be no clear consensus between the Contracting States as to the manner in which to legislate for the broadcasting of religious advertisements. Certain States have similar prohibitions (for example, Greece, Switzerland and Portugal), certain prohibit religious advertisements considered offensive (for example, Spain and see also Council Directive 89/552/EEC) and certain have no legislative restriction (the Netherlands). There appears to be no 'uniform conception of the requirements of the protection of the rights of others' in the context of the legislative regulation of the broadcasting of religious advertising." (*Id.*, § 81).

outcome of the case, in parallel with the approach of the European Court in the cases *Wingrove* and *Otto-Preminger-Institut*. In other words, in the absence of a definite European policy, when there is no evidence of a restriction of freedom of expression overtly disproportionate, the margin of appreciation of national governments must prevail.

## V. CONCLUDING REMARKS

The comparative study of limitations of religious freedom permits to obtain some conclusions on how different legal systems deal with the possibility or the necessity of those limitations, from a variety of perspectives, which include not only the limitations that *may not* be considered necessary, but also the restrictions that *must* be considered necessary for the protection of other legal interests.

The ECtHR looks at this issue from a distinct viewpoint. Contrary to national governments, legislatures and courts, which must harmonize a number of heterogeneous juridical interests and may use various legal instruments, the ECtHR has a narrower role. Being a supranational court with the function of reviewing the measures adopted by legitimate national authorities, it may only adjudicate on the *necessity* of those measures, on their compatibility with the rules and principles of the European Convention; on their “permissibility”, to use the term mentioned in the title of this conference.

In the foregoing pages I have explained with some detail the ECtHR’s case law in this respect. Now, I would like to emphasize some features of the Court’s approach.

The first aspect that should be pointed out is that the European Court deals in a cumulative way with the legitimate aims mentioned in art. 9(2) ECHR (public order, safety, health or morals, and the protection of the rights and freedoms of others).<sup>168</sup> Normally, the Court refers to several of these limitation-concepts when judging a restrictive measure adopted by national authorities. And sometimes, it seems that they are used not only cumulatively, but also indistinctively.

The ECtHR has not endeavored to define carefully the profiles of those concepts. They have often been utilized with a remarkable flexibility or, rather,

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<sup>168</sup> This point was also stressed by the paper of Professor Gerhard Robbers to the previous meeting of the European-American Law and Religion Consortium, cited *supra* note 102).

with indetermination and even vagueness. There has not been a detailed and explicit legal construction of those concepts in the case law of the Court. It seems that they have been understood as instrumental notions conceived to remark different dimensions of a more general concept: the common good, the public interest, or whatever we may call it, which in any event is deemed to be superior and to prevail over the legitimate interests of individuals, no matter how high they are. Thus, the Court is implicitly admitting that those concepts fulfill a function that is sometimes more political than strictly juridical.

In other words, almost any specific purpose pursued by national authorities can be justified according to the wide and ambiguous meaning attributed to limitation-concepts by the ECtHR. This is not necessarily negative. Apparently, the Court did not want to create too rigid concepts, to confine article 9(2) ECHR into a corset, perhaps being aware that, as the precise content and expressions of human rights are subject to historical evolution, a correlative flexibility should be recognized to the aims that justify a restriction on those rights—if our understanding of human rights changes, the permissible limitation on them must also change.

Thus, the logic of the limitation-concepts of art. 9(2) ECHR is to exclude generally that national authorities act arbitrarily when restricting freedom of religion or belief. Any restriction must pursue at least one of the legitimate aims mentioned in art. 9(2). But, as the Court has construed so widely and vaguely those legitimate aims, and has renounced to define their content in detail, the arbitrariness of national authorities has to be avoided by resort to the other elements of art. 9(2). This seems to be the reason why the case law of the ECtHR has emphasized the significance that, in practice, have the other two requirements contained in that article.

One is a *formal* requirement: the restrictive measure must be “prescribed by law” (which is not so distant from the notion of due process typical of the common law). The other is a *substantial* requirement: the restriction must be “necessary in a democratic society,” being necessity understood as an adequate relation of proportionality between the specific (and legitimate) goals pursued by the restriction and the nature of the restrictive measure itself.

The latter has been the real concern of the Court in most cases, and what it has striven to clarify: the idea of proportionality between aims and means. More precisely, the ECtHR has endeavored to guarantee that there was no clear disproportion between a restriction on religious freedom imposed by national authorities and the particular (and legitimate) aim at which it was directed. In



this approach there is an implicit idea: that a court can revise the decisions adopted by democratically elected governments and legislatures. It is interesting to note it, for that idea is deeply rooted in the European legal and political conscience in spite of having been recently imported from the common law tradition, and notwithstanding the fact that the vast majority of the ECtHR's judges come from civil law countries.<sup>169</sup>

In any event, the European Court has never pretended to define the notion of "necessity", or of proportion between aims and means, in an absolute fashion. On the contrary, the ECtHR has endeavored to reach a balance between universal principles and national solutions, i.e. between the uniformity of the essential content of human rights and the variability of local restrictions according to the respective cultural, social, political and historical circumstances. The instrument to achieve this balance, as we have seen, is the doctrine of the 'margin of appreciation', which recognizes to national authorities a margin of free appreciation with regard to the necessity of some restrictions on religious freedom (or on other freedoms).

Naturally, free appreciation is not equivalent to arbitrary appreciation, and therefore any restrictive measure has to be accompanied by a sound justification to be accepted as legitimate according to the ECHR. But the margin of appreciation doctrine is a way of affirming that national differences, in addition to being unavoidable, are not necessarily illegitimate or unreasonable; it is therefore a way of declaring that uniformity in all aspects of human rights is not the goal of the European Convention. This is especially true in relation to freedom of religion, for the Strasbourg case law has always been as respectful as possible with the different systems of Church-State relations existing in Europe.<sup>170</sup>

Certainly, it is not easy to draw the separation line indicating where necessary uniformity ends and acceptable local differences commence. Moreover, this separation line is movable (as the evolution of the case law on

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<sup>169</sup> This circumstance is especially interesting when one realizes that in most European civil law countries, in spite of the traditional and still strong reluctance of the courts to revise the decisions adopted by legislatures, the influence of the ECtHR—and of Constitutional Courts—contributes to introduce the common law notion of judges as law makers. As a consequence, there is in Continental Europe an increasing sensitivity towards the significance of reviewing the legitimacy of statutory law, a task that would correspond to the judiciary. As a paradox, in the U.S. there is a growing tendency to put the role of judges as law makers under suspicion and to affirm that the courts should not interfere with the legislatures. This fact was mentioned by Professors Cole Durham and Frederick Gedicks at one of the debates of the previous meeting of the European-American Law and Religion Consortium, Emory University, September 2002.

<sup>170</sup> See Javier Martínez-Torrón & Rafael Navarro-Valls, *supra* note 3, 216–18.

article 8 ECHR demonstrates<sup>171</sup>). And it is a positive reality in itself, for it demands a vigorous judicial activity, continuously attentive to the developments in our social and cultural environment. And attentive also to the political changes within the Council of Europe, which may lead, for instance, to pay particular attention to the application of the margin of appreciation doctrine when the restrictions on religious freedom are imposed by countries with less democratic tradition.

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<sup>171</sup> See, recently, *Goodwin v. United Kingdom*, 11 July 2002, on the issue of legal recognition of transsexuality.